FILE COPY

Office - Supreme Court, U.
FILED
SEP 14 1936
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. [redacted]17

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

BRIEF AND ARGUMENT FOR PETITIONERS.

SAMUEL R. KENWORTHY,
Solicitor for Mechanics Universal Joint Company.
SHELBY L. LARGE,
Solicitor for Grace M. Ekstrom, Administratrix of the Estate of Eric Ekstrom, Deceased.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

INDEX.

	Page
Statement of the Case	2
Argument	13
Does R. S. 5242 Have Any Application to the Facts in This Case, *i. e.*, Does the Record Show That the Conditions, Enumerated in R. S. 5242, Which Declares a Payment Made By a Bank to One of Its Bona Fide Creditors Void, Existed in This Case?	14
Did Ekstrom's Intent or Purpose Comply With the Condition of the Statute and Render the Payment Void	34
As to the Knowledge of Ekstrom Being Confidential	50
If the Statute (R. S. 5242) Has No Application, Was It a Fraud at Common Law for a Corporation (Bank) to Prefer One Bona Fide Creditor (Depositor) Over Others, When the Preference Was Effected at a Time When the Corporation Was Carrying On the Business for Which It Was Organized, and Before Its Assets Were in Custodia Legis, But at a Time When Its Officers and Directors Knew or Should Have Known That the Bank Was Insolvent and Its Closing Was Imminent?	52
The Rule and Statute in Bankruptcy Has No Application to the Case at Bar	77
R. S. 5236 in No Way Changes the Rule, Because That Section Has Reference Only to the Distribution of Assets of a Bank After the Assets Are Surrendered by the Corporation to the Comptroller, and After the Latter Has Liquidated the Same	78
Counterclaim	85
Was It Permissible for Plaintiff, in the Court Below, to Join in One Cause of Action in Equity a Complaint Against a Depositor for Receiving a Payment of Money Alleged to Be Void Under R. S. 5242, and in the Same Action to Seek to Recover from a Director of the Bank for an Alleged Violation of a Common Law Duty?	86
Did the Court Err in Admitting and Considering Exhibits 22, 24, 25 (R. 242-254)?	99
Did the Court Err in Dismissing the Counterclaim?	106
The Court Below Erred in Rendering a Money Judgment Against Ekstrom	116
Conclusion	121

CASES CITED.

American B. & T. Co. v. Federal Reserve, 256 U. S. 350 (358). 16
American Surety Company v. Jackson, 24 Fed. (2) 768..... 72
Ames & T. Co. v. Heslet, 19 Mont. 188, 61 Am. St. Rep. 496... 68
Anderson v. First National Bank, 6 N. D. 497; 72 N. W. 916.. 105
Atkinson v. Rochester Printing Co., 43 Hun. 167..... 106

Bank of Montreal v. J. E. Potts Salt Company, 90 Mich. 345.. 62
Blair v. Ill. Steel Co. 159 Ill. 350..... 68
2 Bolles Banking, p. 803..... 68
Booth v. Powers, 56 N. Y. 22..... 106
Brennan v. Tillinghast, 201 Fed. 609..... 109

Cadle, Receiver v. Baker, et al., 20 Wall. 650, 651..... 104
Catlin v. Eagle Bank, 6 Conn. 235..... 62
Chesapeake & O. R. Co. v. Mihas, 280 U. S. 102 (106).....98, 120
Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218..... 120
14a C. J., page 491, Sec. 2359..... 115
43 C. J. 632, and cases there cited..... 119
3 Clark & M. Corp. p. 2365, Sec. 780..... 68
Colorado Fuel & Iron Co. v. Western Hardware Co. 16 Utah 4, 50 Pac. 628..... 68
Corbin v. Mumford, 148 Fed. 37..... 72

Dent v. Ferguson, 132 U. S. 50, 33 L. Ed. 242..... 94
Dent v. Ferguson, 132 U. S. 50..... 118

Federal Reserve Bank v. Idaho Association, 8 Fed. (2nd) 922 109
Federal Reserve Bank v. Omaha National Bank, 45 Fed. (2) 511 72
Fidelity and Deposit Co. v. Kelso, 287 Fed. 828..... 109
First National Bank v. Dovetail B. & G. Co., 143 Ind. 550, 40 N. E. 810..... 65
First National Bank and Trust Company v. Manning, 116 Conn. 335..... 72
3 Fletcher on Corporations, Sec. 812..... 110
3 Fletcher on Corporations, Sec. 824, and authorities there cited 111
Fogg v. Blair, 133 U. S. 534..... 59

Graham v. La Crosse & M. R. Co., 102 U. S. 148..... 59
Gould v. Little Rock, M. R. & T. R. Co., 52 Fed. Rep. 680..... 64
Grand De Tour Plow Co. v. Rude Bros. Mfg. Co. 60 Kas. 145, 55 Pac. 848..... 68
Hayden v. Chemical National Bank, 84 Fed. 874, 876....20, 26, 33
Hollins v. Brierfield Coal & Iron Company, 150 U. S. 371.... 59
Hospes v. Northwestern Manufacturing and Car Company, 48 Minn. 174..... 62
Ingals v. Lord, 1 Cow. 240..... 106
In Re Marseilles Extension Ry. Co. 6 L. R. 7 Ch. 161..... 115
Interstate, etc. Corp. v. Jewelry Co. 280 Ill. 116 (122)..... 105
Interstate Finance Company v. Hosch, 163 S. W. 600..... 115
Kendall v. Bishop, 76 Mich. 634..... 62
La Grange Butter Tub Company v. National Bank of Commerce, 122 Missouri 154..... 63
Latham v. Brown, 16 Iowa 118..... 106
Lamb v. Ulrich, 94 Okla. 240..... 72
Levering v. Brinck, 146 Ind. 545, 45 N. E. 775..... 68
Little Red River Levee Dist. v. Garret, 154 Ark. 76..... 111
Livingston v. Columbian Banking Co. 81 S. C. 244, 22 L. R. A. (N. S.) 445..... 68
Marvin v. Martin, 20 Fed. (2nd) 746..... 109
Mechanics Universal Joint Company v. A. B. Culhane, Re-
McDonald v. Chemical National Bank, 174 U. S. 610....21, 28, 42
McPeters v. Phillips, 46 Ala. 496..... 106
ceiver, etc., 80 Fed. (2) 147..... 2
Meechem Agency, 2nd edition, Secs. 1837, 1838..... 111
Merced Bank v. Ivett, 127 Cal. 134, 59 Pac. 393..... 68
National Bank v. Scott & Co. 18 Utah 400..... 68
National Sav. Bank v. Ward, 100 U. S. 10 Otto 195.....98, 120
Northern Pacific R. Co. v. Adams, 192 U. S. 440 (450)....98, 120
O'Bear Jewelry Co. v. Volfer, 100 Ala. 205, 28 L. R. A. 707.. 65
O'Brien, Receiver. v. East River Bridge Co. 161 N. Y. 539, 48 L. R. A. 122.....48, 68
Ohio Miller Mutual Ins. Co. v. Artesia State Bank, 39 Fed. (2) 400..... 111

2 Parsons on Contracts, 471 106
People v. Clark, 329 Ill. 104 (110, 111) 105
People v. Gould, 345 Ill. 288 (328-9) 105
Pondville Company v. Clark, 25 Conn. 97 63
Quinn v. Earle, 95 Fed. 728 109
Randall v. Howard, 67 U. S. 585 118
Randolph v. Howard, 67 U. S. 585, 17 L. Ed. 269 94
Richardson v. New Orleans Coffee Co. 102 Fed. 785 109
Rockford Grocery Co. v. Grocery Company, 175 Ill. 89 66
Rucker v. Kokrda, 68 Fed. (2) 73 30
Sanford Fork and Tool Company v. Howe & Company, 157 U. S. 312 58
Scott v. Armstrong, 146 U. S. 499, 36 L. Ed. 1059 94
Slack v. Northwestern Nat. Bank, 103 Wis. 57, 74 Am. St. Rep. 841 68
St. Louis Ry. Co. v. Johnson, 133 U. S. 566; 33 L. Ed. 683 ... 109
Stone, Receiver, v. Jenison, 111 Mich. 592 35
Swentzel v. Penn. Bank, 147 Pa. 153 72
Thompson-Howard Electric Light Co. v. Henderson Electric & G. L. Co., 21 S. E. 951 65
Tiffany Bank & Banking, p. 346 68
Tower v. Bank of River Raisin, 2 Dougl. (Mich.) 530 62
Van Alstyne v. Cook, 25 N. Y. 489 62
Vann v. Federal Reserve Bank of Richmond, 47 Fed. (2) 786. 72
Wabash, St. L. & P. R. Co. v. Hane, 114 U. S. 587 59
Warfield, H. & Co. v. Marshall Canning Co. 72 Iowa 666, 2 Am. St. Rep. 263 68
West v. Hanson Produce Co. 6 Colo. App. 467 68
Wheeler v. Matthews, 70 Fla. 317, 70 So. 416 67
Wheeler v. Sage, 68 U. S. 1 Wall. 518 (530), 17 L. Ed. 646 94
Wheeler v. Tage, 68 U. S. 1 Wall. 518 118
Wilkinson v. Bauerle, 41 N. J. Eq. 640 64
Wilson v. Baker Clothing Co. 25 Idaho 378, 50 L. R. A. (N. S.) 239 68
Worthen v. Griffith, 59 Ark. 562 64

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 853

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

OUTLINE OF BRIEF.

I.

(1) A subject index of the matter in this Brief, with page references, and

(2) A table of cases alphabetically arranged, textbooks and statutes cited, with reference to page where they are cited.

II.

The official report of the opinion of the Circuit Court of Appeals for the Seventh Circuit is as follows:

Mechanics Universal Joint Company v. *A. B. Culhane, Receiver, etc.*, 80 Fed. (2) 147.

There is no official report of the opinion of the District Court, for the Northern Division of Illinois, Western Division, but its findings of fact are found in the Record here at Pages 185-193, and its conclusion of law at Pages 193-194, and its decree at Pages 195-6.

III.

The suit was instituted by a Federal Administrative Official—the Receiver of a National Bank—to enforce a claim arising in the liquidation of the assets of a National Bank, under and by virtue of a Federal Statute (R. S. 5242).

The petitioners were Defendants in the District Court and did not there, and do not here, challenge the jurisdiction of the Federal Court.

IV.

A CONCISE STATEMENT OF THE CASE.

The decree below was rendered, in an action in equity, instituted by the Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, to recover back from Mechanics Universal Joint Company, a Corporation which was a *bona fide* depositor in said Bank, and to recover against Eric S. Ekstrom, its President, the amount, paid by said Bank on the last day it was open for business, of $42,761.12, being the amount of a check drawn

by Mechanics Universal Joint Company upon said Manufacturers National Bank and Trust Company, payable to the order of said Mechanics Universal Joint Company, and duly endorsed by it to the Third National Bank of Rockford, Illinois, which check was dated June 12, 1931, was sent by mail by Mechanics Universal Joint Company to the Third National Bank of Rockford, and was by said latter Bank presented to the Clearing House of Rockford and duly honored and paid by said Manufacturers National Bank and Trust Company on Saturday, June 13, 1931, in the morning clearings of that day. The check in question was signed by Eric S. Ekstrom, President of Mechanics Universal Joint Company, and by A. E. Gustafson, Assistant Treasurer of said Company. The decree awarded to the Plaintiff a judgment against the Mechanics Universal Joint Company, a Corporation, and Eric S. Ekstrom, in the sum of $25,216.45 (being the amount of the check less certain dividends due to said Mechanics Universal Joint Company in the liquidation of the assets of the Bank, plus interest), and costs. (See Decree. R. 195.) From this decree an appeal was prosecuted to the United States Circuit Court of Appeals of the Seventh Circuit and the decree was there affirmed by an opinion of that Court on November 15, 1935. (See opinion of the Circuit Court of Appeals. R. 231 to 237.) A Petition for Rehearing was duly filed in the Circuit Court of Appeals and on December 31, 1935 was denied. (R. 239.) Petition for Certiorari was duly filed in this Court and allowed.

The facts out of which this controversy arose are, in brief, as follows:

Petitioner, Mechanics Universal Joint Company (hereinafter for brevity called the "Joint Company") was in 1931 a manufacturing corporation with a plant and factory in Rockford, Illinois. It was a subsidiary of Borg-Warner

Corporation, which owned all its shares except Directors' qualifying shares. (R. 105.)

Eric S. Ekstrom, President of the Joint Company, was also a Director of the Manufacturers National Bank and Trust Company of Rockford, hereinafter called "Manufacturers Bank".

The petitioner, Joint Company, in June, 1931, maintained deposits in various Banks in Rockford, Illinois, as follows (R. 87):

1. In Manufacturers Bank.
2. In Security National Bank.
3. In Third National Bank.
4. In Rockford National Bank.
5. In Swedish American National Bank.

During the months of May and June, 1931, the Joint Company had deposited in the Manufacturers Bank in its commercial or checking account the following amounts on the dates stated (See Plaintiff's Exhibit 3, R. 123-124):

May 6	$ 167.19
May 9	28,021.33
May 15	24,911.68
May 18	25,000.00
May 23	534.35
May 25	4,163.00
May 28	2,928.61
May 29	10,149.61
May 30	284.44
June 1	10,195.28
June 6	44,617.21
Total	$150,972.70

(R. 188.) (R. 123-124.)

It also maintained a savings account in said Bank of $10,000. (R. 98.)

On June 12, 1931, the Joint Company had on deposit in the Manufacturers Bank a balance, in its checking or com-

mercial account, of $63,224.30, and a balance on deposit in its savings account of $10,000. (Finding 8, R. 188.)

On June 12, 1931, petitioner drew its check on the Manufacturers Bank for $42,761.12, payable to itself. This check was signed by Officers of Joint Company as follows: By Eric Ekstrom, President, and A. E. Gustafson, Secretary-Treasurer, and, on the back, was endorsed by the Joint Company to Third National Bank of Rockford. (R. 133.) This check was mailed to Third National Bank of Rockford on June 12, 1931, together with a deposit slip directing the Third National Bank to deposit the amount of same to the credit of the Joint Company with said Bank. (Plaintiff's Exhibit 2, R. 122.) This check was received by the Third National Bank in due course of mail and was presented by it for payment, through the Rockford Clearing House, on Saturday, June 13, in the morning clearings of that date (R. 38), and the same was paid and honored by the Manufacturers National Bank on presentation. It is because of this payment that the present suit was brought to declare the payment void, either because of R. S. 5242, or as a void and fraudulent preference at common law, and to recover back the amount of said payment.

The Manufacturers National Bank remained open for business during the whole banking day of June 13, 1931 and during that day, and at all times previous thereto, it met and honored every demand made upon it and took and received every deposit tendered to it (Finding 23, R. 192) and was able to and did meet all its obligations as they matured.

On Thursday, June 11, 1931, one Floberg, the President of the Rockford Clearing House, who also happened to be President of the Manufacturers National Bank, had received notice from the President of the Security National Bank that the *latter* Bank likely might not be able to meet its clearings, and Floberg, as President of the Clearing

House, had conveyed this information to the National Bank Examiner at Chicago, and had received word from the Examiner that the Examiner would immediately proceed to Rockford, which he did, arriving there on the morning of June 12. The Examiner first went to the Security Bank and made tentative arrangements by which the Swedish American Bank would take over the Security Bank, subject to an appraisal of assets of the latter Bank, and had secured a contract for said take-over, subject to said apprisal, signed by both Banks involved. (R. 38-39.) About eleven o'clock in the morning of June 12, the Examiner (Baty) attended a meeting of the Directors of the Manufacturers Bank, which he had requested the President of the Bank to call. and at said meeting Ekstrom, a Director of the Bank, who was also President of the Joint Company, was present.

The Examiner at this meeting briefly discussed the banking situation, told of the situation in which the Security Bank found itself, stated he had arranged for a take-over of the Security Bank by the Swedish American Bank and stated that this situation, whether the take-over was effected or not, in his opinion, would cause uneasiness and a critical Bank situation in Rockford the following Monday, and expressed his opinion that the situation would result in a run on all Banks in Rockford on the following Monday; and further stated it as his opinion that the anticipated run would be so severe that the Manufacturers Bank could not withstand it, on account of its low cash reserves, and he suggested to the Directors that "it would be for the best interests of the banking situation for their Bank to try and arrange some place to take their deposit liability under cover". He outlined to them that there were four National Banks on the east side of the river in Rockford and that with two National Banks on the east side the banking position would be much better. The Directors ex-

pressed the opinion they could stand any kind of a run that developed. The Examiner stated their cash reserves were entirely too low for the Bank to weather any continued drain of deposits and it was his opinion, and the opinion of the Chief Examiner, that they would require far greater cash reserves. (See R. 39-40.) Baty requested the Directors to give him authority to discuss the affairs of the Bank with some other Bank in Rockford in order that he might negotiate a merger with some other Bank (R. 60) and encouraged the Directors in the belief that he could be of a good deal of assistance to effect a merger provided he was given authority to approach some one whom he had in mind. (R. 113.) As a result of the importunities of the Examiner at this meeting, the Directors of the Manufacturers Bank authorized Baty to discuss a possible merger of said Bank with any Bank in Rockford. Committees were appointed by the Manufacturers Bank to meet with a Committee of the Bank with whom Baty was to negotiate to effectuate the proposed merger.

This conference between the Bank Examiner Baty and the Directors of the Manufacturers National Bank terminated about noon on Friday, June 12, 1931, and after that meeting the Bank continued to function in its ordinary way for the balance of that banking day, June 12, and all of the banking day of June 13, during which days it committed no act of insolvency; it met, in due course, all of its obligations as they matured, received all deposits which were tendered to it and in every respect conducted its business as a solvent, going Bank. When it closed at the end of the day's business on Saturday, June 13, it closed with the expectation on the part of all its managing officers that it would reopen for business the following Monday, as usual. It was faced with no matured obligation that it was unable to meet. It closed on Saturday at the conclusion of the day's business with approximately a half million dollars in

cash, or its equivalent, in its vaults, or on deposit in other Banks. (R. 44. See also Defendant's Exhibit 5, R. 171.) This consisted of

Cash	$253,240.06
On deposit, Federal Reserve	220,181.21
On deposit in other Banks	12,435.94

At the time the payment in question was made, not a single one of its managing officers contemplated the commission of an act of insolvency or contemplated the closing of the Bank. After the Bank closed for its day's business on Saturday, which was after the payment of the check in question, a meeting was held between a Committee from the Third National Bank of Rockford and a Committee from the Manufacturers National Bank, which had been arranged by Examiner Baty, for the purpose of appraising the assets of the Manufacturers National Bank, as a part of the negotiations for the merger which the Bank Examiner was endeavoring to effectuate. This meeting between the Committees from the two Banks convened at seven o'clock in the evening of June 13, at the Manufacturers National Bank, after the Bank had closed its business for that day, and after the check in question had been paid, and continued in session until the following morning. No conclusion was arrived at as to the merger at that meeting. Nothing was done at that meeting except to go over the assets of the Manufacturers National Bank and there was some discussion as to the value of some of the assets, but no conclusion was reached as to the value of any of the assets. (See testimony of Achor, R. 61-62.) On Sunday night, June 14, the Directors of the manufacturers National Bank were called together, and at that time the Directors were advised by Examiner Baty and Chief Bank Examiner Leyburn, that the Third National Bank of Rockford would not consider the proposed merger unless the Directors of the Manufacturers National Bank would turn over to the Third

National Bank *certain specified assets* (R. 62) of the Manufacturers National Bank, and in addition thereto, would pay to the Third National Bank $750,000.00 in cash, and that this payment would have to be made before Bank opening time on Monday morning, June 15. The Examiner further stated that he knew it was impossible for the Directors of the Manufacturers Bank to comply with the demands of the Third National Bank within the time specified, and he demanded that the Directors of the Manufacturers National Bank adopt the following resolution (Plaintiff's Exhibit 6, R. 126):

> "That due to frozen and non-liquid assets, it is the opinion of the members of this Board convened that the interest of the depositors of this Bank can best be preserved by suspending business and placing the affairs of this Bank in the hands of the Comptroller of the Currency: Now, therefore: BE IT HEREBY RESOLVED, that the business of this Bank be suspended and placed in the hands of the Comptroller of the Currency."

The Bank Directors protested that the Bank was not insolvent and at first refused to adopt the resolution which the Examiner had already prepared previous to the meeting, but under threat of prosecution by the Comptroller, of the Directors, if they kept their Bank open and received deposits, the Directors reluctantly passed the resolution, which is found in the Record at Page 126, after the same was somewhat modified. (See also R. 104.)

There is no question but that the first time the Directors of the Manufacturers Bank or any of its Officers knew that the Bank would not resume business on Monday, June 15, was at the meeting on Sunday evening, June 14, and this was approximately thirty-six (36) hours after the payment of the check in question.

The Record contains no proof that prior to the payment of the check in question the Manufacturers National Bank had committed any act of insolvency, nor that its Officers

contemplated the commission of an act of insolvency, and neither the District Court nor the Court of Appeals found that any act of insolvency had been committed, or was contemplated by any of the Officers of said Bank at the time of the payment of said check. The theory upon which the decree was rendered, and sustained by the Court of Appeals, as we understand it, is that although the Manufacturers Bank was keeping open and doing business in the regular way and holding itself out thereby to be a solvent, going institution on June 12 and 13, yet, its condition was, in fact, precarious, and the Bank's Officers *should have known* that the Bank was insolvent at the time the check in question was paid by it, and because *they should have known it*, it will be presumed that they paid the check in question "with a view" of preferring the Joint Company, or of preventing the application of the Bank's assets as provided by the National Banking Act.

The evidence offered, as to the condition of the Bank prior to the payment in question, is contained in Exhibits 22, 24 and 25 (R. 242-254), which exhibits consist of an Examiner's report of the condition of the Bank as of December 4, 1930, and a letter from the Comptroller to the Directors of the Manufacturers National Bank under date of January 8, 1931; also of a letter from the Comptroller of the Currency under date of May 28, 1931 to said Directors, enclosing a report of examination of the condition of the Manufacturers Bank as of May 1, 1931. In the report of the examination made to the Comptroller by the Examiers in charge, it was *estimated*, in the December examination, by the Examiner, that the Bank had sustained losses of $162,877.12, and that losses probable, but not estimated, were $462,105.64, and the Examiner *estimated* that there was slow paper amounting to $1,036,102.10. In said report, also, the Examiner expressed the opinion that 48% of bills receivable were subject to criticism, and that fur-

ther losses were inevitable, and that Directors were borrowing for themselves and their companies in excess of the Bank's invested capital. In the recapitulation of the examination of May 1, the Examiner made similar expressions of *opinion* as to the losses, and doubtful and slow assets, and also expressed the opinion that over 50% of all loans were subject to criticism and heavy losses were in prospect; also, that Directors' borrowings were still in excess of invested capital and that heavy losses on these loans were inevitable. In the letters from the Comptroller to the Directors the attention of the Directors was called to the Examiner's *opinions* as to the assets. An objection was interposed by the Defendants to the introduction of these Exhibits 22, 24 and 25, which will be hereafter argued in this Brief, and, if there was any proof in the Record that shows that the Bank was in an insolvent condition in the sense that its assets were less than its liabilities, that proof is only shown by these exhibits, and there was no other proof of any kind or character showing that the Bank was insolvent in the sense that its liabilities exceeded its assets, and no proof of any kind was offered showing that the Bank was insolvent in the sense that it was unable to meet its obligations as they matured.

V.

The errors to be argued are as follows:

The decree below should be reversed because

(a) As appears from the Record a decree should have been entered herein in favor of Defendants (Respondents) on the Bill of Complaint, and in favor of Defendant, Joint Company (Respondent), on its counterclaim.

(b) As appears from the Record, the Court below erroneously held that the withdrawal by the Mechanics Uni-

versal Joint Company of the sum of $42,761.12 from the Manufacturers National Bank and Trust Company on June 13, 1931 was void because of R. S. 5242.

(c) As appears from the Record the Court below erroneously held that the withdrawal by the Mechanics Universal Joint Company of the sum of $42,761.12 from the Manufacturers National Bank and Trust Company on June 13, 1931 was void and fraudulent, notwithstanding the withdrawal was not inhibited by R. S. 5242.

(d) The Complaint improperly joined a statutory action against the recipient of a payment alleged to have been made void by R. S. 5242, with an asserted common law or equitable cause of action against a Director.

(e) As appears from the Record, the Court below erred in admitting Plaintiff's Exhibits 22, 24 and 25, respectively, and in considering the same and in basing its decree thereon.

(f) As appears from the Record the Court erred in dismissing the counterclaim of Defendants and in not awarding relief to Defendants, Mechanics Universal Joint Company, thereunder.

(g) The decree erroneously awarded a judgment against Eric S. Ekstrom, Defendant, who had no interest in the payment, had no right or title to it and who did not receive it or any part of it.

(h) That the decree and judgment is contrary to the law.

(i) That the decree and judgment is contrary to the evidence.

VI.

ARGUMENT.

As petitioners view this case, there are but two major questions involved in it. They are

(A) Does R. S. 5242 have any application to the facts in this case, *i. e.,* does the Record show that the conditions, enumerated in R. S. 5242, which make a payment by a Bank to its *bona fide* creditor void, existed in this case?

(B) If the Statute (R. S. 5242) has no application, was it a fraud at common law for a Corporation (Bank) to prefer one *bona fide* creditor (depositor) over others, when the preference was effected at a time when the Corporation was carrying on the business for which it was organized, and before its assets were *in custodia legis,* but at a time when its Officers and Directors knew or should have known that the Bank was insolvent, and that closing was imminent?

The other questions involved are merely incidental. They are as follows:

(C) Was it permissible for Plaintiff, in the Court below, to join in one cause of action in equity a Complaint against a depositor for receiving a payment of money alleged to be void under R. S. 5242, and in the same action to seek to recover from a Director of the Bank for an alleged violation of a common law duty?

(D) The Court erred in admitting and considering the Plaintiff's Exhibits 22, 24 and 25. (R. 242-254.)

(a) They were inadmissible;

(b) They did not prove any material fact in the case.

(E) The Court erred in dismissing the counterclaim.

(F) The Court erred in decreeing a money judgment against Ekstrom.

We shall argue these questions in the order and under the headings and numbers above indicated.

(A)

DOES R. S. 5242 HAVE ANY APPLICATION TO THE FACTS IN THIS CASE, I. E., DOES THE RECORD SHOW THAT THE CONDITIONS, ENUMERATED IN R. S. 5242, WHICH DECLARES A PAYMENT MADE BY A BANK TO ONE OF ITS BONA FIDE CREDITORS VOID, EXISTED IN THIS CASE?

R. S. 5242 (12 U. S. C. A. Sec. 91) is as follows, but as only a portion thereof is of any application to the facts in this case, we take the liberty of italicizing such parts only of the Statute as it can be claimed is pertinent to this inquiry, and for the purpose of analysis we attach a letter to each clause thereof to which we will hereafter refer:

> (A) "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors;" (B) *"and all payments of money to either, made"* (a) *"after the commission of an act of insolvency, or"* (b) *"in contemplation thereof, made with a view"* (c) *"to prevent the application of its assets in the manner prescribed by this chapter, or"* (d) *"with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void;"* (C) "and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any State, County, or Municipal Court."

In this case there can be no contention that any other portion of the Section above quoted, except that portion italicized and including Clause "B" and subdivisions (a), (b), (c) and (d), have any application, because in the case at bar, the only transaction between the Bank and its depositor (the Joint Company), referred to either in the pleadings or proof, was a *payment of money* by way of the honoring of a check drawn by the depositor on the Bank. No notes or securities or mortgages were assigned or bullion or other valuable things deposited for the use of petitioners, or either of them.

A *payment of money,* amounting to $42,761.12, *was made by the Bank* on the morning of June 13, 1931 to the Third National Bank of Rockford through the Rockford Clearing House. This payment was made to honor a written order or check of the Joint Company drawn on the Manufacturers Bank, payable to the order of the Joint Company and endorsed and delivered by it to the Third National Bank of Rockford, Illinois (R. 133), and the payment was made at a time when the Joint Company had a balance on deposit, to its checking account in the Manufacturers Bank, of $63,224.30, a large portion of which had been deposited a few days prior to this payment. This was the only transaction attacked by the Plaintiff by his pleadings, or proof, so that we can start out upon the undisputed premise that the transaction claimed to have been void, was a *payment of money,* and that such *payment* is inhibited, if at all, in only that portion of the Statute above italicized and designated "B". Congress did not, by said Statute, make *every* payment by a Bank to its depositor, void, and as the whole scheme of the National Banking Act implies that a depositor in a National Bank shall be free to withdraw his deposit, or any part thereof, on demand, it is fair to assume that Congress had no intention of declaring any payment of money to a depositor by a Bank, void, except in

those instances, and under those conditions, expressly stated in the Statute. It is our contention that Congress carefully and advisedly attempted to specify the conditions under which payment by a Bank to its depositor would be void. It has always been supposed that the relation between a Bank and its depositor was a relation analogous to that of debtor and creditor, and that the contract implied by law, upon a commercial deposit being made, was that the Bank would pay its depositor, on demand, all, or any portion, of his deposit that he demanded; and that the usual payment by a Bank to its depositor, on the latter's demand, was a valid and lawful performance, by a Bank, of its contractual obligation, and that the payment, once made, was a final act, which, to the extent of the payment, satisfied and completed the contract, and lawfully reduced the deposit by the amount of the payment.

American B. & T. Co. v. *Federal Reserve*, 256 U. S. 350 (358).

We do not deny the right of Congress to provide, in its National Banking Law, that a payment made under *unusual* circumstances, or at *unusual* times, may be void, but we vigorously contend that if Congress sees fit to enumerate the unusual circumstances, or specify the unusual times in which a payment by a Bank to its depositor should be void, that its enumeration of the circumstances and times, in such an act, should be held by a Court to be the only circumstances or the only times, which would void the payment; that for a Court to extend or amplify the Statute and make it apply to circumstances or times not expressly specified in the act, would amount to a judicial usurpation of legislative power. Surely if a payment, made in performance of a solemn contract, is lawful under some circumstances, and unlawful or void under others, because of an inhibiting Statute, the circumstances under which the payment would

be void should be so specifically stated in the Statute that there can be no uncertainty about it. And we claim that Congress has, by carefully chosen language, been specific in its enumeration of the circumstances which will void such payments, and we further contend that the undisputed facts in this case, as found by the Chancellor and conceded by the Circuit Court of Appeals, do not show a payment made under the circumstances enumerated by Congress in Section 5242, which would render the payment void.

Let us then examine the *act* in question and attempt an analysis of it to determine just what *payments* made by a Bank to a depositor are therein declared to be void. Clause "B" does not make *all payments* of money by a Bank to its shareholders or depositors void, but only those payments made

(a) "after the commission of an act of insolvency", or

(b) "in contemplation thereof",

and only then, if the payment is made with the *intent* provided in Sub-sections (c) or (d) of said Clause "B".

The proof in this Record is undisputed that at the time the payment in question was made, the Manufacturers Bank had committed no act of insolvency. The District Court expressly so found (Finding 24, R. 193) and the Circuit Court of Appeals confirmed that Finding, and the pleadings in this cause do not charge, and, so far as we know, Respondent has never claimed, that the Bank had committed *an act* of insolvency prior to the payment, so Clause (a) of the Statute may be eliminated from consideration.

Was then the payment made "in contemplation of" an act of insolvency, as described in Clause (b) of the Statute? There is no proof in this Record that the payment made by the Bank was made by its Officers "in contemplation of

an act of insolvency", or "in contemplation of insolvency", whichever is the proper construction of the Statute. Neither the District Court nor the Court of Appeals found that there was any such proof, but both seem to hold that such proof was not necessary. It was enough, they hold, that the Bank subsequently became insolvent, and they both hold that, as the Bank was in substantially the same situation, at the time of the payment, as it was when closed by the Comptroller, *it will be presumed* that the Officers and Directors of the Bank *should have known* that the Bank was insolvent, and that closing was imminent. This, we claim, is the error which renders the decision below unsound and at variance with the opinions of this Court.

In the first place, the Bank was not in substantially the same condition when it was closed by the Comptroller as it was when the payment was made, for, when the payment was made its doors were open, it was functioning as a Bank, and was able to and did meet all demands made upon it, and no action had been taken by its Officers admitting its inability to continue in business. When the Comptroller closed the Bank, it was a closed institution, suspended by a resolution of its Directors adopted nearly thirty-six (36) hours after the payment in question had been made, and which resolution was adopted because another Bank in the City had failed, and negotiations for augmenting the credit of the Manufacturers Bank, which were pending when the payment was made, had been unsuccessful.

Under the Statute, as we read it, a payment of money by a Bank to its depositor, if not made *after* an act of insolvency, is only void if made "in contemplation thereof", *i. e.*, "in contemplation of *an act* of insolvency". The Courts below have construed this clause as though it read "in contemplation of insolvency". This construction not only does violence to the syntactical arrangement of the

clause and its relation to the preceding clause, but is a construction in conflict with the meaning this Court has given to the act in *McDonald* v. *Chemical National Bank,* 174 U. S. 610. National Banks are not required to be solvent in the sense that their assets exceed their liabilities in order to conduct their valid business. If this were true, then all payments made by any Bank to a depositor, at a time when its solvency was questionable, would be void. But Congress did not see fit to so declare. We presume there are few Banks which, in the period of their business life, have not, at times, been contemplating insolvency in the above sense. Certainly Banks, no matter how conservatively managed, do go through periods of depression and the value of their securities shrink because thereof. A Bank, in times of depression, always finds itself with frozen assets, with depleted security for its investments, and it frequently is impossible for its Officers to know the exact value of its assets if they must be suddenly liquidated. In such times, all honest Officers of such Banks, who have knowledge of its condition, do "contemplate", in the sense that they "look forward to", or "are concerned" as to, *insolvency.* If they are honest Officers, they are confronted with the problem, under such circumstances, of struggling to keep their Bank open and going, or of hoisting the white flag of surrender. We make bold to say that every Bank has gone through such a period, if it has been in business over a span of years, at some time in its existence. If there was a Bank in this great country during 1931, which did not have assets in its portfolio which were criticized by the Comptroller, it was the exception. If there was a Bank at that period whose Officers were sure it was solvent in the sense that its assets, at their then value, were in excess of its liabilities, such Bank was a rarity. To place a construction upon this Statute which would have the effect of determining that every payment made by a Bank to its

depositors is void when the officials of the Bank are *concerned* as to whether its assets exceed its liabilities, would require every Bank to close whenever a substantial portion of its assets became slow or frozen. Such a construction would play havoc with the depositors and the Statute would do more damage than benefit to the persons it was designed to protect, namely, depositors. In the construction of a Statute, the Court always searches for the purpose of the legislature in enacting the law, and will so construe it as to give effect to that purpose, if possible. The purpose Congress had, in enacting R. S. 5242, manifestly was the protection of depositors, and to secure depositors in Banks which had committed an act of insolvency, or whose Officers were contemplating such an act, a pro rata distribution of the assets of said Bank. The object or purpose which Congress had in enacting the Statute would not be carried out if such a construction of the act is given as would require the Officers of the Bank, when they became concerned as to its solvency, to immediately close the Bank for liquidation, without making a struggle to keep the Bank open until the emergency had passed.

On the other hand, if Clause "b" "or in contemplation thereof" be given its ordinary grammatical interpretation, it will be construed as though it read "or in contemplation of *an act* of insolvency".

The term "act of insolvency" is not a term frequently met with in legal literature, and in using the term in the Statute in question, Congress was legislating concerning but one class of debtors—Banks—and was defining an act which would avoid what would otherwise be a perfectly lawful transaction between a Bank and its depositor. So far as we can discover, there has been but one attempt by a Federal Court to define the precise meaning of the term as used in this particular act. In *Hayden* v. *Chemical National Bank*, 84 Fed. 874, at Page 876, the Circuit Court

of Appeals of the Second Circuit, speaking through Justice Wallace, says:

> "An act of insolvency takes place when a business concern or a Bank has failed to pay some of its obligations, made an assignment for the benefit of its creditors, suspended business, or done any of those things which indicate to creditors that a debtor has become insolvent."

The above case was approved by this Court without, however, a construction by this Court of the term "an act of insolvency", in the case of *McDonald* v. *Chemical National Bank*, 174 U. S. 610.

Now, the evidence in this case, as found in the findings of the Courts below, conclusively shows that the Bank had committed no act of insolvency prior to the payment. What act of insolvency did it *contemplate* when the payment was made? Neither of the Courts below have attempted to point out what act of insolvency was contemplated, and neither seem to regard the Clause of the Statute as meaning more than a *realization* by its Officers that the Bank, in the near future, might be called upon to meet an unprecedented run, which a Bank Examiner feared it would not be able to withstand. Is it an "act of insolvency" on the part of a Bank for a Bank Examiner to express an opinion to its Board of Directors that, in his opinion, banking conditions in the City are such that the Bank will shortly be faced with a run of such proportions that the Bank will be unable to meet its demands, and to request the Directors to permit him to negotiate a merger with another Bank in a more liquid position? We believe the answer must be in the negative. Can it be said that a *payment* to a *bona fide* depositor, after such an expression of opinion has been made by an Examiner to the Directors, is "*a payment made in* contemplation of an act of insolvency"? The Courts below seem to indicate that

they entertain no such notion, but, they reason that, when consideration is given to the fact that for six (6) months prior to this expression of opinion by the Examiner, the Comptroller had on two occasions criticized some of the assets of the Bank, that these facts make it clear that the payment was made in contemplation of an act of insolvency. Judge Sparks, in the opinion of the Circuit Court of Appeals below, uses this language (R. 236):

> "It may be true that none of the Officers thought it was insolvent, or contemplated an act of insolvency or the closing of the Bank, but in view of the condition disclosed, and the reports and correspondence from the Comptroller, together with the advise and suggestion of the Examiner, we are convinced that the Officers and Directors *should have known* that the Bank was insolvent and that closing was imminent." (Italics ours.)

We respectfully submit that the above quoted conclusion goes beyond the Statute. The Statute does not say that a payment, made when the Officers and Directors "should have known that the Bank was insolvent and that closing was imminent", is void. To add that condition to the act of Congress, is to add a condition to invalidate a payment, which Congress did not see fit to write into the law. No Department of Government but Congress has the power to declare what acts will invalidate such a payment by a National Bank to its depositor. Congress carefully chose the words to define the conditions under which such a payment would be invalid. The facts in this case admittedly do not bring the payment within the prescribed condition. Here the Bank, when the payment was made, was open for business, was able to and did meet all demands made upon it as they were presented (R. 192. Finding 23). It closed its doors on Saturday for the banking day, with approximately a half million dollars in cash, or its equivalent, to meet the prophesied run the following

Monday. At the time the payment was made, all its Officers believed the Bank solvent. (See testimony of Floberg, R. 113; Olson, R. 109-110; Ekstrom, R. 105.) No decision had been then made to close the Bank. No such closing had been contemplated or suggested by any of its Directors or Officers, or by the Examiner or Comptroller. It is true, negotiations had been authorized, *at the request of the Examiner,* looking toward a merger with another Bank, but those negotiations had not progressed, even to a point of a meeting of the parties, at the time the payment was made. But the negotiations were authorized, not because of any critical condition of the Manufacturers Bank, but because *banking conditions* in Rockford were deemed by the Examiner to be critical. This critical condition of banking conditions had not been brought about or caused by any change in the condition of the Manufacturers Bank, but because another Bank (Security Bank) was embarrassed and would likely close or be taken over. This, in the opinion of the Examiner, would cause uneasiness among depositors of Banks in the City, and this was the reason, and only reason, the Examiner suggested (that because of the low cash reserves of the Manufacturers Bank that it might not survive the run he predicted), he desired authority to negotiate a merger with another Bank. There is no proof that the cash position of the Manufacturers Bank was any *lower* on the day he addressed the Directors than it had been for six months previous thereto. It appears from Exhibit 22, that on December 4, 1930 the Bank's cash position, as indicated by its cash on hand, on deposit in the Federal Reserve, and on deposits in other Banks, equaled $352,775.45 (R. 245). The same items shown as of May 1, 1931 equaled $379,555.48 (R. 251), while the cash position as disclosed by the same items on June 12, 1931 (the day of the Directors' meeting) equaled $485,837.21 (Defendant's Ex. 5,

R. 171). Thus the cash position of the Bank was *higher* by over one hundred thousand dollars than it had been for six months prior to meeting of June 12, and there was no *change* in its cash position which caused the Examiner apprehension, but it was that he considered the cash position too low (even though more than it had been for six months), to withstand a protracted run, which he did not *know* but only *predicted* would happen. And his prediction of a run was based, not on any condition of the Manufacturers Bank which caused uneasiness among the depositors of Rockford, but on the fact that it would become public that the Security Bank was in distress. The Bank was kept open for the purpose of its regular and usual business, and a part of its regular and usual business was not only the acceptance of deposits, but also the payment to depositors of their demands, and to meet and pay such checks as were presented through the Clearing House. This check of the Joint Company was presented to the Bank through the Clearing House on the morning of June 13, in the regular course of business, together with other checks of other depositors, and, in the regular course of business, and in the usual and ordinary course of the Bank's clearings, was paid. The payment of the check through the clearings by the Bank's Officers was not *actuated* by the knowledge its Officers had of its condition any more than the payment of the checks of other depositors, either over the counter or through the Clearing House, was actuated. Whatever the knowledge of the Directors or Officers of the Bank as to its condition, the payment of this check was not made "in contemplation" of such knowledge. It was made in the usual, ordinary way, in the ordinary course of the Bank's business. It was legally incumbent upon the Bank, so long as it kept its doors open, to honor and pay the checks of all its depositors which were presented for payment. It performed

this obligation fully and completely. So far as the Record in this case disclosed, this Bank preferred no depositor. It treated them all with equality. It kept its doors open and held itself in readiness to pay every depositor on demand, and it was able to, and did, meet the demands of every depositor so long as the Bank was open. And it kept open the whole of the banking day of Saturday, June 13. It closed its doors at the end of that day with the expectation on the part of all its Officers and Directors to open for business on Monday morning following. Its determination to close its doors did not take place until Sunday evening, June 14, and this determination was not caused or actuated by any knowledge as to the condition of the Bank the Officers of the Bank had prior to or at the time of the payment of the check in question, but because of a series of events which occurred on Sunday, namely, the announced failure of the Security National Bank; the failure of the negotiations the Bank Examiner was conducting to effect a merger of the Manufacturers Bank with the Third National Bank, and the sudden and persistent demand, *never before made,* by the Bank Examiner, for a resolution to turn the Bank over to the Comptroller for liquidation. This resolution, at that time (Sunday evening) was reluctantly voted by the Directors, who acted, more or less under coercion, and yielded only after threats, by the Examiner, of prosecution, if they kept the Bank open. Every Director of the Bank, who was present at the meeting on Sunday evening, was of the opinion the Bank was solvent and so stated, and argued, to the Examiner (R. 104), but they could not withstand the threats of the Examiner. We do not criticize the wisdom of the Examiner, nor do we say that the Directors were unwise in voting the resolution to close, but we say that there can be no doubt, from this Record, but that the Directors and Officers of the Bank *honestly thought* that the Bank was

solvent and able to continue to perform its banking obligations even at the time they voted to turn the Bank over to the Comptroller. The Statute is aimed at a payment made "after an act of insolvency, *or in contemplation thereof*". How, we ask, could a payment made by Officers of the Bank, who honestly thought the Bank was solvent, and when no act of insolvency had occurred, be said to have been made "in contemplation of either insolvency or of an act of insolvency"?

"Contemplation", defined by Webster, denotes "purpose", or "intention". He defines the word as "an act of looking forward to an event as about to happen; act of intending, purposing or considering, hence intention, consideration, etc." Justice Wallace, in *Hayden* v. *Chemical National Bank*, 84 Fed. 876, in defining the meaning of the word as used in this Statute, says:

> "A Bank or business concern may be considered to be acting in contemplation of insolvency when, in making some disposition of its assets, it is *actuated* by its knowledge of its insolvency."

The Court of Appeals of the Seventh District, in its opinion filed in the case below, seems to voice the opinion that the words "in contemplation of" have the same meaning as "with knowledge of" and even goes to the extent of stating, in its opinion heretofore quoted, that if the Officers of the Bank "should have known" that the Bank was insolvent, or its closing imminent, that the payment was made "in contemplation of" insolvency. We earnestly insist that the condition of a payment made *in contemplation* of an event is not satisfied by proof of a payment made by Officers *who should have known*. The Circuit Court of Appeals, when this case was before it, seemed to follow the conclusion of law No. 4 found by the District Court, that is as follows (R. 193):

> "In view of the knowledge possessed by the Defendant, Eric S Ekstrom, which he had acquired be-

cause of his confidential connection with the Manufacturers National Bank, when he drew the check of the Defendant Corporation for $42,761.12, *it would be inequitable* to allow the Defendant Corporation to obtain the advantage which it would thereby obtain over other depositors by virtue of the knowledge which its President had acquired." (Italics ours.)

The District Court, however, did not find as a fact that the payment of the check in question was made by the Bank in contemplation of insolvency. Its findings of fact, numbers 23 and 24, were fully sustained by the evidence and are as follows (R. 192-193):

Finding Number 23:

"During the whole period from June 6, 1931 to June 13, 1931, both days included, said Manufacturers National Bank and Trust Company remained open during each banking day, and on each of said days transacted its usual and ordinary banking business, accepting such deposits as were tendered to it, and on each and every of said days paid all and every demand which were made upon it; that it honored every check drawn upon it by its respective depositors which was presented to it during said days, and paid all checks drawn upon it by its respective depositors which were presented through clearings with other Banks on said days, and during said period was able to and did meet all of its obligations as they matured."

Finding Number 24:

"The Court finds that the payment by the Manufacturers National Bank and Trust Company of Rockford, Illinois, of the sum of $42,761.12 upon check of the Defendant, Mechanics Universal Joint Company, against its checking account in said Bank, and the transfer of said sum to the account of said Mechanics Universal Joint Company in the Third National Bank of Rockford on June 13, 1931, was not after the commission of an act of insolvency by the Manufacturers National Bank and Trust Company of Rockford, Illinois; that prior to said payment and transfer the said Manufacturers National Bank and Trust Company of Rockford, Illinois, had committed no act of insolvency."

The whole theory upon which the District Court determined this case, as shown in Conclusion of Law Number 4 and upon which the Circuit Court of Appeals affirmed the decree as shown by the above quoted excerpt from its opinion, seems to be that although the Bank had been continuously open and doing business, with the knowledge of the Comptroller, since December 30 down to and including June 13, 1931, yet, that the Bank was, in fact, insolvent during that period, and such insolvency *should have been known* to its Officers, including Ekstrom, one of its Directors and that therefore the payment in question was void. This theory we earnestly contend not only is untenable, but is in conflict with the opinion of this Court as announced in *McDonald* v. *Chemical National Bank*, 174 U. S. 610. In that case, this Court held there could be no recovery and upon the very theory advanced by the Court below, states as follows:

> "Nor can a finding that the payments and remittances made to the Chemical National Bank on the dates above mentioned were made *in contemplation of* insolvency and *with an intent* to prefer that Bank be based on the mere allegation that the Capital National Bank was actually insolvent, *and that its insolvency must have been known to its Officers.* It is a matter of common knowledge that Banks and other Corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the Bank can be kept up by continuing its ordinary business and by avoiding any act of insolvency, events may take a favorable turn and thus suspensions of payments and of business be avoided." (Italics ours.)

This Record discloses no intent or purpose on the part

of any paying officer of the Bank to either prefer the Joint Company in the making of the payment, nor is there any indication that the payment was *actuated* by a contemplation of insolvency. In fact, none of the Officers of the Bank at the time the payment was made had the remotest idea that the Bank would shortly close its doors, or suspend business. All they knew was that the Comptroller of the Currency had criticized some of the Bank's assets and had been vigorous in his criticism of them, and that a Bank Examiner had voiced his opinion that a run on all the Banks of Rockford was impending, which, *in his opinion,* the Manufacturers Bank would be unable to withstand. The Officers and Directors of the Manufacturers Bank disagreed with the Examiner. They felt, and so advised the Examiner, that their Bank could stand any run that developed. (R. 39.) At the time this payment was made, there was not only the belief on the part of the Directors that the credit of the Bank would be maintained indefinitely, but they were led to believe *from representations made* by the Bank Examiner that he could likely effect a consolidation with a Bank which he had in mind, and the Bank was kept open, with the belief on the part of all its Officers and Directors that it was solvent and would be able to withstand any run of its depositors, without any thought of or contemplation of an immediate closing thereof.

The "purpose", the "intent", implied by the use of the words "in contemplation of", as used in the Statute, are what Congress made the element of voidability. A payment made, which is *actuated by a knowledge* of the closing of a Bank, is an entirely different sort of a payment from one made in regular course of business by a payor Bank "who should know" it is in bad condition and may be forced to close its doors. It is one thing to make a payment at a time when the Bank, in its regular course of busi-

ness, is paying *all* demands made upon it, in an honest effort to keep the Bank open until all hope of saving it is gone, and another thing entirely for a Bank to make a payment, *not* in the regular course of business, *not* during usual banking hours, when *it is known* the Bank will shortly close, or at a time when, if the ordinary demands are paid, the funds of the Bank will be exhausted, as are the facts in all the cases cited by Respondent. The latter payment would be void under the Statute, not because the payment was made at a time when the Bank's Officers "should have known of its insolvency", but because it was made by the Officers of the Bank "in contemplation of insolvency or an act thereof", and with an "intent" or "purpose" to treat one depositor more favorably than others.

As said by the Circuit Court of Appeals of the Fourth Circuit in *Rucker* v. *Kokrda,* 68 Fed. (2) 73, in discussing the facts of that case:

> "When the payment was made, the decision to close the doors on the following morning had not been reached. That decision was not arrived at until late that night. True, the Officers knew that unless new money was interested, or confidence restored, the Bank could not indefinitely meet its customers' demands; but when the payment was made, the Officers were hopeful the negotiations of the night would avert the necessity of an act of insolvency. This payment was, therefore, not made in contemplation of the later act of insolvency."

If that reasoning is sound, then it applies to the facts in this case, for in this case the facts are undisputed that when the payment in the case at bar was made (on Saturday morning, June 13), the decision to close the doors on the following Monday had not been reached, nor had it been discussed. That decision was not arrived at until Sunday evening and the decision was then reached, not because of any condition of the Bank known to the Officers at the time payment was made, but because of a demand

for such action, made the first time on Sunday evening by the Bank Examiner, and because of threats of prosecution of the Bank's Officers if the Bank was kept open. At the time the payment was made in this case, the Officers of the Bank were hopeful that a merger would be effected through the efforts of the Examiner, which it was thought would restore confidence in banking circles in Rockford and thus avert the threatened run which the Examiner, but not the Officers, thought would be disastrous.

But, even if the construction which we urge, of the meaning of the words of the Statute "or in contemplation thereof", be erroneous, and even if the condition prescribed by the Statute avoiding a payment made in contemplation of insolvency or an act thereof, is satisfied, as the Court of Appeals seems to hold, if made at a time when the Officers of the Bank "should have known that the Bank was insolvent and that closing was imminent", yet, the Statute does not make every payment void when made "after the commission of an act of insolvency, or in contemplation thereof". Congress has, by the Statute, imposed further conditions necessary to exist before the payment may be declared void; those conditions are imposed by the succeeding clauses of the Statute (c) or (d) which read:

(c) "Made with a view to prevent the application of its assets in a manner prescribed by this chapter."

(d) "Or with a view to the preference of one creditor to another."

The language of the Statute "made with a view" is synonymous with "made with an intent or purpose" to accomplish the object sought by Congress to be inhibited.

Both Courts below have ignored these clauses of the Statute—have decided this case as though these clauses (c) and (d) were not a part thereof. There can be no contention that there is any proof in this Record that any of the Officers of the Bank who managed it, or who were au-

thorized to make payments for it, had any intention or purpose to make an unlawful preference when the payment in question was made. The payment was made through the Clearing House of Rockford on June 13, 1931, not as a single item, but among a list of forty-four items or checks from the Third National Bank of Rockford, comprising a total of checks on the Manufacturers Bank, cleared from the Third National Bank on that day, of $53,604.22. (See Plaintiff's Exhibit 25, R. 125.) There is no proof in the Record of what checks, if any, drawn on the Third National Bank, had been presented through the Clearing House by the Manufacturers Bank which would off-set this $53,604.22 in the clearings, nor is there any proof that the clearings between the two Banks were balanced by a payment in cash by one Bank to the other. If the Manufacturers Bank, on that day's clearings, had presented checks it held which were drawn upon the Third National Bank, then, in the usual course of clearings a balance would have been struck and the difference paid in cash by the Bank holding the lesser amount of checks, to the one holding the larger. How this clearing was effected, whether by a payment in cash by the Manufacturers Bank to the Clearing House of $53,604.22, or whether, involved in the clearings, there was an off-set of checks, is not disclosed by the Record, but however it was effected, the point we make is that it was a clearing made in the usual way, and there are no circumstances to indicate that there was any *intent or purpose* on the part of any paying officer of the Manufacturers Bank to clear the check of the Joint Company any more than there was to clear any one of the other forty-three checks involved in the same clearing. There is no proof in the Record that the presence of the check in question in any way or manenr influenced the clearing of forty-four checks as one item. The clearing would have been effected

regardless of the presence of this check therein. There is no evidence that the clearing of the forty-four checks was influenced by knowledge on the part of the Bank or its Officers of the presence therein of the check of the Joint Company, or that the clearing was effected outside the regular and usual business of the Bank. The clearing was effected either by Mr. Kramer, the bookkeeper of the Manufacturers Bank, or by Mr. Conklin, the Cashier, and was testified to by Mr. Conklin (R. 37), a witness for Plaintiff, who testified concerning the transaction as follows:

> "Plaintiff's Exhibit 5 is a list of the clearings received from the Third National Bank by our Bank on June 13, 1931. That is the usual way in which clearings are exchanged, by having a list. It is a list made up by the Third National Bank in their Clearings Department as a list of checks that they had against our Bank to be exchanged through the clearings on June 13. All these items were checks that they had against the Bank on that morning. There is nothing on the list that would indicate the amount of checks our Bank had against the Third National Bank to be exchanged that morning. This list shows that the total of checks the Third National Bank had against the Manufacturers Bank on June 13 was $53,604.22. * * * In my opinion the item $42,761.12 indicates the same item as the figure $42,761.12 mentioned in Plaintiff's Exhibit 4."

We believe the above quoted testimony is the only proof in the Record concerning the clearings, on June 13, and we contend that this evidence, adduced by Plaintiff, disclosed that the transaction relative to the clearings, was, as the witness stated, conducted in the usual and ordinary way, and in exactly the same way as the other forty-three checks, of other depositors shown in Plaintiff's Exhibit 5, were cleared at the same time that the check in question was cleared.

A case very similar, on the facts, to the case at bar is *Hayden* v. *Chemical Bank*, 84 Fed. 861 (876), heretofore

cited. In holding a state of facts very similar to those in the case at bar insufficient to avoid a payment, that Court, speaking through Judge Wallace, said:

> "The Capital Bank had not committed an act of insolvency. Assuming that its managers knew that its liabilities greatly exceeded its resources, and that it would presently be unable to meet its obligations, and have to suspend, there is no evidence that the payment in question was influenced by that knowledge. A payment to a depositor, or other creditor, in the usual course of the Bank's business as a going concern, and not preparatory in any sense to the anticipated insolvency of the Bank, is not, we think, within the condemnation of the Statute. An act done by a Corporation in the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency."

Neither the District Court nor the Court of Appeals, in their consideration of the case at bar, were able to find, and neither found, that the payment in question either was influenced by the knowledge the Bank's Officers had of its asserted condition, or was made with a view, or intent, or purpose, on the part of the Officers of the Bank to (c) prevent the assets of the Bank from being applied in the manner prescribed by the Statute, or (d) prefer the Joint Company as a creditor, and they both intimate that such finding is not necessary, because, they argue, that Ekstrom must have had such an intent, and that Ekstrom was an Officer, namely, Director of the Bank.

Did Ekstrom's Intent or Purpose Comply With the Condition of the Statute and Render the Payment Void?

The condition imposed by the Statute is, that if the *payment is made* "with a view" either to "prevent the application of the assets" or "to prefer one creditor over another", the payment is avoided. Assuming the words "with a view" are to be construed to be synonymous with the word

"intent", or "purpose", or "motive", then the intent or purpose or motive must be in the mind of the Officer of the Bank who *makes, or directs, the payment.* The Statute cannot be logically construed as referring to the intent or purpose or motive of the one who receives the payment. If that was the intent of Congress, it would not have confined the voidability to the "payment" alone, but would have used the words "any payment *or receipt* of money" made under the circumstances enumerated, "is void", or would have used language indicating that the intent of the recipient of the payment should be an element governing the avoiding of it. But Congress used no such language in the Statute. Although Ekstrom was a Director of the Bank, he had nothing to do with the payment of this check. He was not a paying officer of the Bank. He was not an employee of the Bank, and had nothing to do with its management, aside from being a director. Neither did he receive payment of the check. The check was paid to the Third National Bank of Rockford in the clearings of that day.

The State of Michigan has a Section of its Banking Act which is identical with Section 5242 of the Federal Revised Statutes. This Statute is recited in the case of *Stone, Receiver,* v. *Jenison,* 111 Mich. 592, where Mr. Justice Hooker, in a concurring opinion, uses this language:

> "It seems to be agreed that the right of Plaintiff to recover must be based upon the fact that after the Bank has committed an act of insolvency, or when in contemplation thereof, the payment sought to be recovered back was made with a view to prevent the application of the assets in the manner prescribed by the Banking Act, or with a view to the preference of one creditor over another. We may reasonably say that the words 'with a view to' mean with the intent or design of pursuing a particular course, and that this intent or design means the intent of the Bank or Officers making the payment, and not the intent of the recipient of the payment."

Precisely the same conclusion was reached by the Circuit Court of Appeals of the Fourth Circuit in the case of *Lucas* v. *Federal Reserve Bank*, 59 Fed. (2) 617 in construction of R. S. 5242. In the Lucas case it appears that the Federal Reserve Bank, after it had made a loan on collateral security to the National Bank of New Bern, and after it, the Reserve Bank, had determined that the National Bank was insolvent, and its assets frozen and uncollectible, had demanded that the National Bank transfer to it, as additional security for its prior loan, $208,000.00 of additional collateral, which additional collateral the National Bank transferred to the Federal Reserve Bank, and it was claimed, in that suit, that this was a transfer of assets made by the National Bank in contemplation of insolvency, and with a view of granting a preference, and that the transfer was void by reason of R. S. 5242. The allegations of the Bill, as to the motive and intent of the transfer, were briefly recited in the opinion as follows:

> "That the Reserve Bank, by reason of its access to and examinations made of member Banks, had a more intimate knowledge of the condition of the assets of National Banks than their own Officers."

In other words, it was contended by the Bill of Complaint, in the *Lucas* case, that the transfer there in question was void, because of R. S. 5242, solely upon the ground that the intention of the *transferee* brought the payment within the condemnation of that Statute, notwithstanding there was no such intention on the part of the Officers of the Bank who participated in the transfer. As to this contention, in the Lucas case, p. 621, the Court said:

> "The purpose of the Statute was to guard against the wrongful or preferential disposition of the assets of a Bank by its Officers, in contemplation of insolvency; and the knowledge and intent which it requires for avoiding a transfer, relate to the knowledge and intent on the part of the Officers of the Bank, who alone have the power to make the transfer." (Citing cases.)

"As said by Judge Wallace in the case of *Armstrong* v. *Chemical National Bank, supra,* 'a Bank is not in contemplation of insolvency until the fact becomes reasonably apparent to its Officers that it will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations. On the other hand, if the Officers of the Bank make the transfer in contemplation of insolvency with a view of granting a preference, the transferee's knowledge, or want of knowledge, is immaterial' ". (Citing cases.) "*If the Officers have no such knowledge or intent, it manifestly cannot be condemned as preferential, whatever may be the knowledge or intent of the transferee.*" (Italics ours.)

The Courts below, in the case at bar, seem to reason that the intent of the Bank to make a preferential payment to the Joint Company can be *assumed* because the Directors of the Bank *should have known* that the Bank was insolvent and that closing was imminent, and because further that Ekstrom was a Director of the Bank, who, in common with the other Directors of the Bank, should have had such knowledge, and that Ekstrom signed his name as President of the Joint Company to the check of the Joint Company, which was paid by the Bank, and the payment was only effected because of an affirmative act of Ekstrom, or, in other words, the payment would not have been made had not Ekstrom signed the check for the Joint Company, but the fallacy of the argument is that, not only is there no proof that the signature of Ekstrom to the check was *necessary* to effect a withdrawal, but also that Ekstrom performed no act, in the whole transaction, *as Director of the Bank.* When he attached his name to the check, he did so as *President of the Joint Company,* not in his capacity as a Director of the Bank. As a Director of the Bank he could only act at a meeting of the Board of Directors (unless he was an agent duly authorized by a majority of the Board). From the time that meeting convened until the time it adjourned, if he was present, he is chargeable, as a Director,

with whatever act he participated in, but when the meeting was over, whatever he may have then done, was his individual act, and as a Director he could not be chargeable therewith nor could his act bind the Bank.

7 R. C. L. 439.

Even if we assume it to be true that Ekstrom, with knowledge of the Bank's imminent closing, acquired as a Director of the Bank, and for the purpose of assisting the Joint Company to effect a withdrawal of a part of its deposit before the Bank closed, signed a check for the Joint Company and directed its presentation for payment through the Clearing House, or otherwise, yet, whatever he did, was as agent of the *Joint Company* and not as an agent of the Bank. He took no part in the *payment*, which is the thing which is made void by the Statute. It is no answer to argue that a payment consists in the act of two parties; that a payment cannot be made unless contemporaneously with the payment there is an acceptance. The *payment* made with a certain *intent* on the part of the *payor* is what Congress has made void, and the intent on the part of the *payor* must exist or the condition of voidability imposed by the act is not violated. The Statute refers to "all payments *made*" at a certain time, "*made* with a view", etc., shall be null and void. The time of the *making* of the payment, as expressed by the words "*made* after an act of insolvency or in contemplation thereof", and the *intent* with which the payment is made, as expressed by the words "*made* with a view", indicate clearly, we think, that the participial word "*made*", in each instance, modifies the word "payment", and refers to the intent of the *one making the payment*. Congress was so specific about this that it indulged in needless repetition in the use of the word "made" in the Statute. While this may be tautology, it is strongly indicative that the repetition of the word "made", in the act, and its use both to prescribe the *time* and the

intent which must exist to render the payment null and void, was done deliberately by Congress in order to emphasize the modification of the preceding words "payment", and to make it doubly clear that, in order to invalidate a payment, the *payment* should be *made* at the time designated, and also be *made* with the intent prescribed. If, to be void, a *payment* must be *made* with a certain intent, the *intent* must relate to the *maker* of the payment, otherwise it is not *made* with the intent described. If the maker has not the intent, but the recipient of the payment has such *intent,* then while the payment may be *received* with such intent, it cannot be said that it is *made* with such intent. While it is true that a payment cannot be made unless, contemporaneously with the payment, there is an acceptance, this is true of most acts where two or more parties are involved. It is true of a "delivery", of a "demand", of a "gift" or of a "sale" and of numerous other transactions. In each of those instances the term is used to describe the act of only one of the parties to the transaction. Other terms are used to describe the act of the other party to it. The act of the party *receiving* a payment is the exact opposite of the act of the party who *makes* the payment. One act is passive, the other active. A payment is the act of one delivering a thing in satisfaction of a *debt,* the receipt of the payment is the act of one who is accepting the payment in satisfaction of a *credit* extended. Ekstrom was not an agent of the Bank to pay checks. No such authority had been conferred upon him and no such authority was vested in him as a Director. No action of the Board of Directors was taken authorizing the payment to the Joint Company of the check in question. The obligation on the part of the Bank to pay the check arose by reason of an implied contract between the Bank and its depositor, the Joint Company, to pay and honor the checks of the Joint Company on demand so long as the Bank kept open for the perform-

ance of its obligations. Ekstrom had nothing to do with this contract—at least the evidence does not show he had, and Ekstrom did no act *as a Director of the Bank* which aided or assisted the Bank in making the payment. Ekstrom, as a Director of the Bank, had no power to make a payment of its money on the demand of a depositor. Only the paying Officers or Agents of the Bank had such power. Ekstrom, as one Director of the Bank, could not keep the Bank open nor could he, alone, authorize or prohibit the Bank's paying officers from making or refusing to make payments. And it cannot be claimed that Ekstrom made any payment, or assisted in any way therein, nor did he receive the payment, which payment was received by the Third National Bank, not as Ekstrom's agent, but as agent of the Joint Company. All Ekstrom did was to sign the check of the Joint Company, together with Gustafson, the Assistant Secretary of the Joint Company the act of signing and presenting the check was the Corporate act of the Joint Company. Can it be said that the Joint Company was disqualified from withdrawing a part of its deposit while the Bank remained open, because Ekstrom, its President, had, in his capacity as a Director of the Bank, received information that the Bank was in danger of facing a run which might prove disastrous? Must the Joint Company, under such circumstances, stand by and see the Bank open and paying other depositors and refrain from withdrawing its money? Can a Director of a Bank penalize and disqualify every depositor from making a lawful withdrawal of his deposit, by notifying its depositors that the Bank is threatened with a run which may embarrass it? If the answer to the above interrogatories is in the affirmative, then the payment in question may be declared void—otherwise it sems to us it must be held valid. No decision of this, or any Federal

Court, has gone so far as to indicate the answer of the above questions should be in the affirmative.

We believe that when the depositors of a Bank gather around its doors to withdraw their deposits, in such numbers as to characterize the situation as a "run on the Bank", that each depositor has lost confidence in the stability of the Bank. Each is actuated by an intent to effect a preference. Each is making a withdrawal "with a view" to prefer himself and he gives little consideration to the rights of other depositors. Each hopes that he may reach the paying teller's window and get his money before the Bank closes. But is the validity of his withdrawal effected in any way by R. S. 5242 if he receives his money while the Bank is kept open, regardless of the motive or intent on the part of the paying Officers of the Bank? If so, then the invalidity of the withdrawal must be found in the *construction* of R. S. 5242, for not by any words used by Congress in the Section is there any intimation that the "intent", or "motive" of the depositor is to be weighed to determine the validity of the withdrawal. Congress said nothing about a *withdrawal*, nor did it attempt to make a withdrawal, under any circumstances, void. It did not provide that any payment was void "where the effect" would be a preference of one creditor over another. The only payment the act makes void is a *payment* of money, *made* to a stockholder, or creditor, after the commission of an act of insolvency, or in contemplation thereof, *made* with a view to prevent the application of its assets in the manner prescribed by the chapter, or with a view to the preference of one creditor over another.

An "Act of insolvency" could not only be committed by a Bank or its Officers. Never could it be committed by a stockholder or creditor. The phrase "in contemplation thereof" can only refer to the Bank or its Officers who made the payment. All the phrases of the Section are con-

nected together and refer to the Bank or its paying Officers. The payment to be void, must be *made* "in contemplation of", and "with a view to" and the "contemplation of" and the words "with the view to" must, if the sentence is analyzed by the elementary principles of syntax, be held to refer to the same antecedent, namely, the *payment* of money by the paying officers of the Bank or those who direct the payment.

This construction is now new to this Court. In *McDonald* v. *Chemical National Bank,* 174 U. S. 610, to which we have heretofore referred, the same contention was made that there could be a recovery under R. S. 5242, notwithstanding there was no proof that the payment had been made in contemplation of insolvency, or with the view to prefer one creditor over another. In considering this contention, this Court said (Page 618):

> "In the present instance, there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation *on the part of its Officers* to presently suspend business. It rather shows that, up to the last, the operations of the Bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that *those of its Officers* who knew of its real condition must have dreaded an ultimate catastrophe but there is nothing to justify the inference that the *particular payments in question* were made in contemplation of insolvency, or with a view to prefer the Defendant Bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed." (Italics ours.)

It is true that in the *McDonald* case there was no proof

that the Chemical National Bank had any notice or knowledge that the Capital National Bank, at the time of the payment, was in distress, aside from the fact that about a week previous to the payment the Chemical Bank had refused payment of a draft drawn on it by the Capital Bank, and it has been, and doubtless will be, claimed by Respondent that such fact distinguishes that case from the case at bar. This Court, however, in its opinion in the *McDonald* case, although reciting as a fact that the Chemical Bank appropriated the payments made by the Capital Bank innocently and without knowledge of the embarrassed condition of the Capital Bank, does not, in its reasoning, consider the validity of the payment in relation to any act or a knowledge of the payee—the payment was held by this Court to have been a valid payment because innocently made in the regular course of its business by the Capital Bank and because of the acts and knowledge of the payor.

The Court of Appeals in the case at bar uses this language (R. 237), referring to Ekstrom:

> "He was an Officer of the Mechanics Company as well as a Director of the Bank—hence it was not necessary for him to divulge any information to accomplish the *withdrawal* of the check."

There is nothing, however, in the Statute that provides that a *withdrawal* is avoided under any circumstances. The *payment* is what the Statute avoids, and the *payment* is only avoided if *made,* with a certain intent or purpose on the part of the payor. Nor was Ekstrom's signature to the check, in any way or manner, an act done by him as Director of the Bank.

If, because Ekstrom occupied the dual position of Director of the Bank and President of the Joint Company, it can, as a matter of law be held that the Joint Company was charged with knowledge of every fact that came to Ek-

strom's knowledge as Director of the Bank, and if this court indulges in the presumption that the Joint Company was *actuated* in making the withdrawal because of the knowledge which Ekstrom had, and which was chargeable to it because Ekstrom was its President, yet that is not what the Statute aims to make void. The *payment* was not made at an unusual time or in an unusual manner, nor was it made by the Bank preparatory in any sense to the anticipated insolvency of the Bank. Nor was any knowledge on the part of the Joint Company necessary "to accomplish the withdrawal of the check". The withdrawal was accomplished at a time when the Bank was paying the check of every depositor which was presented to it, and when it was able to do so. In no sense, therefore, can it be said that Ekstrom's *intent* or lack of intent was in any way material in this case, because nothing he did as a Director of the Bank, in any way influenced the paying officers of the Bank in making payment of the check.

If, as we have heretofore argued, the intent of the recipient of the payment is of no materiality, then it makes no difference whether Ekstrom intended to prefer the Joint Company in signing his name to the check, and to that extent assisting it in obtaining a withdrawal of its funds, because he did nothing, as Director of the Bank, to induce the Bank to pay the money, and the money was not paid to him. We respectfully submit that before it can be said that the Joint Company *intended* to obtain a preference, if that is material, we must know if Ekstrom directed the issuance of the check. Admittedly the check was not in Ekstrom's handwriting except his signature thereto. Admittedly it was not directed by him to be prepared. (R. 195.) It was prepared at the direction of the bookkeeper of the Joint Company who had charge of the deposits and withdrawals of the Company's money (W. H. Stark), and without any directions from Ekstrom or any other officer or employee

of the Company, (R. 89) and was written by Stark's Secretary, McGuire (R. 87-8-9) and was taken by McGuire to the office of the Assistant Secretary and of President Ekstrom for their signatures, as the executing officers of the Joint Company, at the direction of Stark, and it was taken up by McGuire after those officials had signed it and delivered by her to Stark, who, in turn, attached a deposit slip to it and handed it back to his secretary, who placed it in the mail. There is no proof whatever that Ekstrom's knowledge of the condition of the Bank had anything to do with the drawing, signing or presentation of this check. To draw such an inference, the direct testimony of Stark, Ekstrom and McGuire, to the contrary, must be ignored and this Court must indulge in speculation and conjecture against positive proof to the contrary.

There is nothing in this case except the fact that the check was presented for payment, soon after the Bank Examiner had advised the Directors of the Bank, including Ekstrom, that he anticipated a run on the Bank on Monday, which the Bank might not be able to withstand, that would arouse even a suspicion that the withdrawal was made because the Joint Company, or Ekstrom, intended to obtain a preference. All of Ekstrom's knowledge as to the condition of the Bank, which was conveyed to him by the report of the examinations of the Bank and the letters from the Comptroller, had come to him long prior to the withdrawal, and, in fact, anti-dates several large deposits aggregating more than the amount of this check which were made by the Joint Company in the Manufacturers Bank. There is no proof that Ekstrom had been advised by any managing officer of the Bank or the Examiner or by the Comptroller that the Bank had either committed an act of insolvency, or that it contemplated suspension, prior to the payment of the check, and in the absence of such information the Joint Company could rightfully withdraw any of

its deposit for any legitimate purpose it chose, so far as any inhibition in R. S. 5242 is concerned, and so long as the withdrawal was effected before the Bank had committed an act of insolvency or contemplated such an act. Even though, from the fact alone that the check was drawn and mailed on Friday, after the meeting of the Board of Directors, which had been addressed by Baty, the Examiner, a Court might be justified in holding that the presumption would be that the drawing of the check was actuated by the Joint Company because of the information which Ekstrom had received at this meeting, yet, Ekstrom did not receive any information at the meeting that the Bank was about to close. If Ekstrom had truthfully reported to his employer, the Joint Company, every fact that had been conveyed to him at the Directors' meeting, all he could have stated truthfully was that a Bank Examiner, in addressing the meeting, had expressed an opinion that banking conditions were such that a run on the Bank could be anticipated the following Monday, and further that *in the opinion* of the Bank Examiner, which opinion was not shared in by the managing officers of the Bank, that the cash reserves of the Bank were so low that it might not be able to withstand the predicted run. He would further have advised the Joint Company that, at the request of the Bank Examiner, authority had been given the Bank Examiner, by the Directors of the Bank, to arrange for a consolidation of the Manufacturers Bank with some other Bank in the City, for the purpose of bettering bank conditions in the City and restoring confidence in the public, and that the Bank Examiner held out hopes that such a consolidation would be effected through his influence. This is all that Ekstrom could honestly have stated. He could not have stated, and been within the truth, that the managing officers of the Bank were contemplating a cessation of its business, or, in the language of the Statute, that they were

"contemplating an act of insolvency. There is nothing in the reports of the Examiner, or the correspondence between the Comptroller and the Directors, in which there was any charge made that the Bank was insolvent, or that it was in such a condition that it could not long continue to function. If the Bank was insolvent, the Comptroller, by issuing his certificate of insolvency, regardless of any action of the Board of Directors or any officer of the Bank, could have appointed a Receiver and closed the Bank, and his finding that the Bank was insolvent would be binding, in the absence of fraud, (of which there is no claim made here), not only upon the world, but upon the Courts. But the Comptroller could not lawfully close the Bank, or appoint a Receiver, for any violation of the Banking Law, such as permitting excessive loans or of doing any act which forms a basis of the Comptroller's criticism of the assets of the Bank, without first obtaining a decree of a Federal Court that the banking law had been violated (R. S. 5239), in which case the Court, and not the Comptroller, would appoint a Receiver for the Bank. It is quite manifest from the letters of the Comptroller to the Directors of the Manufacturers Bank and from the action taken by the Comptroller's representatives on Sunday evening, June 14, that the Comptroller did not deem the Bank insolvent, and that he hesitated to issue his certificate closing the Bank by reason of its insolvency. He desired the Directors to assume the responsibility for closing the Bank, and he presented to the Directors, on Sunday evening, June 14, a resolution, not that the Bank was insolvent, but that the Bank suspend its operations and turn its affairs over to the Comptroller for liquidation because of "frozen and non-liquid assets". (R. 126.) We apprehend that the letters from the Comptroller to the Directors of the Bank were not written for the purpose of conveying information to the Bank that it was insolvent, but were written for the purpose of con-

ceying information to the Directors of certain violations of the National Banking Act, which the Comptroller claimed the Directors had suffered and permitted.

We therefore conclude this branch of the argument by again asserting that the payment in this case was not voided by R. S. 5242, because the proof in this case is conclusive

(a) that, at the time of the payment, no act of insolvency had been committed by the Bank;

(b) nor was an act of insolvency "contemplated" by any of its officers at the time of payment;

(c) nor was there any proof of an intention on the part of the Bank, or its officers, to prevent the application of the Bank's assets in the manner provided by the National Banking Act;

(d) nor was there any proof of an intention on the part of the Bank, or its officers, to prefer the Joint Company over any of its other creditors by the payment in question.

The contention of Respendont that Ekstrom's knowledge of the condition of the Bank and intent to effect a preference for his Company, was a knowledge and intent which is chargeable to the Bank because he was a Director thereof, has been fully considered and answered in the negative by the Court of Appeals of New York in the case of *O'Brien, Receiver* v. *East River Bridge Company*, 161 N. Y. 539, 48 L. R. A. 122.

In that case, a Statute of New York much more stringent than R. S. 5242, was involved. The Statute is recited in the opinion, and so much of it as is applicable is as follows:

"No conveyance, assignment or transfer of any property of any such corporation, by it or by any Officer, Director or Stockholder thereof, *nor any payment made*, judgment suffered, lien created or security given by it or by any Officer, Director or Stockholder when the corporation is insolvent, or its insolvency is immi-

nent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid."

In that case, as in the case at bar, the President of the depositing corporation (East River Bridge Company) was also a Director of the Bank (Madison Square Bank). In that case, such President had, as Director of the Bank, received information at a Directors' meeting that the Bank was insolvent, or in imminent danger of insolvency, and would suspend business the following day. The Director of the Bank also knew that another Bank (St. Nicholas Bank) had in its possession a large amount of securities belonging to the Bank of which he was a Director, and that it held such securities as collateral for any and all obligations as agent of the Madison Square Bank. He also knew that the St. Nicholas Bank had notified the Clearing House that it would cease to act for the Madison Square Bank, and that the St. Nicholas Bank, by the rules and regulations of the Clearing House, was responsible for all checks on the Madison Square Bank that would be presented at the Clearing House in the exchanges on the morning of the following day. *All this knowledge was acquired by said President of the East River Bridge Company in his capacity as a Director of the Madison Square Bank.*

With this knowledge, and knowing also that the East River Bridge Company was a large depositor in the Madison Square Bank, he immediately proceeded to the home of the Treasurer of the Bridge Company, and, at midnight of the day of the Director's meeting, had the Treasurer prepare and sign a check for the total amount of the deposit of the Bridge Company in the Madison Square Bank. *He as President of the Bridge Company, also signed the check.* Early in the morning of the next day, he took the check to the Hanover Bank and instructed the authorities in that Bank to have it presented at the Clearing House that morn-

ing, so that it might be paid by the St. Nicholas Bank in the exchanges of that morning, and thus be credited to the East River Bridge Company, and a withdrawal effected of so much of the funds and moneys or securities of the Madison Square Bank under the control of the St. Nicholas Bank. The Court of Appeals of New York there said:

> "There is no law that forbids a depositor in a Bank who is not an Officer or Director, from drawing a check against the deposit whenever the money is needed or even when it is thought the Bank is liable to fail. The act *by means of which the money was withdrawn in this case was a corporate act of the defendant, and not the individual act of the President.* The money on deposit belonged to the defendant and it was subject to check. The insistence that the defendant in its corporate capacity was induced to exercise its right by information of the condition of the Bank communicated by the President, who was also a Director of the Bank, *cannot change the case,* so long as the right to withdraw the money existed. The defendant cannot be compelled to restore the money simply because it made use of knowledge possessed by one of its own Officers. * * * The act by which the deposit was transferred from the failing Bank to the defendant was not, in any proper sense, the act of the Bank or any of its Officers. It was not a transfer prohibited by law. It is true one of the Bank's Directors participated in it, but not as such Director or as an individual, but as an Officer of the Defendant acting in its interest." (Italics ours.)

AS TO THE KNOWLEDGE OF EKSTROM BEING CONFIDENTIAL.

Respondent contended below, and no doubt will here contend, that the information which came to Ekstrom as a Director of the Bank, as to its condition, was information which was impressed with a confidence, and that for Ekstrom to have communicated these facts to a depositor was a breach of confidence of so grave a character as to amount to fraud. We disagree with Respondent. To maintain

such a contention it must be authoritatively stated, as a general legal proposition, that there is some law which requires a Director of an insolvent Bank, which is remaining open for business, or one about to become insolvent, to conceal the fact of insolvency from everyone. In the Code of Ethics which Respondent advocates, it seems to be entirely moral and legal for a Director of a Bank, knowing it to be insolvent, and knowing the Bank is to be kept open for the purpose of receiving deposits, and knowing that the keeping of the Bank open is an implied representation to the public that it is solvent, to keep his mouth sealed and conceal his knowledge from everyone. According to that Code, he must stand by and see his employer, or his best friend, or his closest relative, deposit money in the Bank, the very keeping open of which, if insolvent, is a fraud, and yet he may not speak the truth and prevent such depositor from being defrauded. Because he received his information at a Director's meeting, he may not speak the truth, for to do so would be a breach of confidence so sacred as to be protected by law. We know of no law which seals the lips of a Director of a corporation or creates a duty on his part to keep his knowledge a secret and thus assist in the perpetration of a fraud, for, if he spoke the truth to a prospective depositor, that information would immediately cause the prospective depositor to withdraw such deposits as he had in the Bank, as well as prevent him from making further deposits. It is the law of some States, founded on principles of equity and fairness which appeal to those Courts that adhere to the rule, that a Director of a corporation may not use the information he acquires as a Director, of the imminent failure of the corporation, *to enable himself* to prefer *himself* if he happens to be a creditor. As to this proposition, the State Courts of this country are in irreconcilable conflict. So far as we know, this Court has never exactly determined that proposition

In this case, Ekstrom did not use the knowledge he obtained to prefer himself. He was a depositor in the Manufacturers Bank to a substantial amount (Finding No. 9, R. 188). He drew out none of his personal deposits, nor did he attempt to. All that he can be criticized for is that he signed the check of his employer, which enabled his employer, the Joint Company, to withdraw a portion of its deposit at a time when the Bank was open and paying the demands of all depositors who presented their checks. As we will hereafter argue, if Ekstrom owed any duty to keep as confidential the information he received at a Directors' meeting of the bank, he did not owe that duty to the Plaintiff (who in this case sues as a representative of the creditors of the Bank) but he owed it alone to the Bank, which, so far as the facts in this case disclose, was in no way injured or damaged by Ekstrom's alleged breach of confidence.

(B)

IF THE STATUTE (R. S. 5242) HAS NO APPLICATION, WAS IT A FRAUD AT COMMON LAW FOR A CORPORATION (BANK) TO PREFER ONE BONA FIDE CREDITOR (DEPOSITOR) OVER OTHERS, WHEN THE PREFERENCE WAS EFFECTED AT A TIME WHEN THE CORPORATION WAS CARRYING ON THE BUSINESS FOR WHICH IT WAS ORGANIZED, AND BEFORE ITS ASSETS WERE IN CUSTODIA LEGIS, BUT AT A TIME WHEN ITS OFFICERS AND DIRECTORS KNEW OR SHOULD HAVE KNOWN THAT THE BANK WAS INSOLVENT AND ITS CLOSING WAS IMMINENT?

In the absence of a Statute there is no rule of common law or equity which prevents a Corporation from preferring a creditor simply because it is financially embarrassed. It has the same *jus disponendi* of its property that an individual or a partnership has. It has the same right to prefer a friendly creditor as an individual has.

In the determination of this case in the Circuit Court of Appeals, that Court disposed of the above contention against the petitioner herein, upon the intimation that there was something fraudulent or inequitable, or contrary to the common law in the fact that Ekstrom, a Director of the Bank, in effect advised the Joint Company, of which he was President, of the uncertain financial stability of the Manufacturers Bank and that this information instigated the Joint Company to withdraw a portion of its deposit in the Bank while the Bank was still open and pursuing its usual business. While the Court below cites no authority to sustain such a proposition and in fact does little more than intimate that there is such a principle of law, yet it, in effect, sustains the decree of the District Court by applying that principle. We earnestly insist that this principle is not sound, nor in accordance with the decided opinions of this Court.

It was argued by Respondent in the Court below, and is urged by it in this Court, that the payment of the check in question was void or unlawful, irrespective of R. S. 5242, because he claims the withdrawal of the amount represented by check in question was prompted by Ekstrom, who not only occupied the dual position of President of the Joint Company and Director of the Bank, but had acquired information at a meeting of the Directors of the Bank, which, it is claimed, was of such a character as to advise Ekstrom that the Bank was, in the opinion of a National Bank Examiner, on the eve of a run which would possibly force it to suspend business, and that, with this information, Ekstrom assisted the Joint Company to make a withdrawal of a portion of its deposit in the Bank, which had the effect of giving to the Joint Company a preference over other depositors, to the amount of the deposit withdrawn. On the basis of the existence of this principle, Respondent, in his Bill of Complaint, prayed as follows:

"Second.—That upon a hearing of this Bill, it may

be found and decreed by the Court that said Eric S. Ekstrom occupied a dual and confidential relation with reference to said The Manufacturers National Bank and Trust Company of Rockford, Illinois, and the said Mechanics Universal Joint Company, a corporation, and that he used information which he gained in confidence at a meeting of the Directors of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, *to the wrongful benefit* and *advantage* of the said Mechanics Universal Joint Company, a corporation."

and it was on the basis of the existence of this principle that the District Court found the law to be as recited in its conclusion of law No. 5:

"(5) It is the law that by virtue of the facts above mentioned the defendant, Eric S. Ekstrom, in causing said check to be drawn and paid, said Eric S. Ekstrom being a Director of the Manufacturers National Bank and Trust Company and occupying a confidential relation toward it when he drew said check for $42,761.12, and thereby caused a transfer of funds belonging to the defendant corporation from the Manufacturers Bank to the Third National Bank, then and there intended to prefer the defendant corporation over the other creditors of said bank and intended to prevent the assets of said bank from being distributed ratably, and that *his act* in so doing was in violation of Section 5242 of the Revised Statutes of the United States, *and was an act done in contemplation of insolvency* of said Manufacturers Bank."

In other words the court did not find that the *payment* was in violation of R. S. 5242, but that the *act of Ekstrom* was in violation of the Statute. May we respectfully suggest that Ekstrom's *only act* in the whole transaction was as an officer or agent of the Joint Company. Not in anything he did was he *acting* for or on behalf of the bank. It is conceded by Respondent that the Bank, at the time this check was honored and said payment made, was kept open for business, was receiving every deposit tendered to it, and was able to and did meet and pay every demand

made upon it, and that, on the day the check was paid the Bank kept open for business the whole of that banking day, and it is conceded that during that day it did not prefer the Joint Company over any other depositor who made a demand on that day, for it paid the demand of every depositor made upon it during the whole of that day. The proof is conclusive and uncontradicted that the Officers of the Bank, on the day the payment was made, had no expectation or intent to suspend the business of the Bank, and everything which they did indicates that they were willing to follow any suggestion of the Bank Examiner which would place the Bank in a more liquid position than it then was, in the hopes that, by following such suggestion, the credit of the Bank could be maintained.

It is further contended by Respondent that the withdrawal of the amount of the check by the Joint Company, because it was effected by a depositor whose President was also a Director of the Bank, who, as such Director had information not available to other depositors, was a species of fraud, and that, because the President of the Joint Company signed the check, his knowledge as to the alleged condition of the Bank was imputable to the Joint Company, and the conclusion is drawn by Respondent, from these facts, that it was fraudulent or inequitable or in violation of some principle of the common law for the Joint Company to take advantage of information as to the condition of the Bank which was acquired by its agent because he was a Director of the Bank.

It is conceded that the Joint Company had deposited a large amount of money in the Bank a few days prior to the withdrawal in question, and that it had on deposit, subject to its demand, an amount largely in excess of the check in question, and it must be conceded that, at common law, so long as the Bank remained open, not only was it the lawful right of the Joint Company to withdraw such part of its

deposit as it desired, but it was the legal obligation of the Bank to pay to the Joint Company, on demand, such part of the latter's deposit as the Joint Company demanded. Such was the implied contract between the Bank and its depositor at the time the deposit was received—to pay on demand so long as the Bank was open.

It is claimed by Respondent, although there is no proof in the Record to support the claim, that the Joint Company would not have made the withdrawal in question had not its President, Ekstrom, received the information (which Respondent characterizes as confidential), given to the Directors of the Bank by the Bank Examiner the day before the withdrawal was effected; that the withdrawal was not made in good faith or in the ordinary course of business by the Joint Company, but was made by it for the sole and only purpose of securing to itself an advantage which other depositors did not have, because it had knowledge of, or was chargeable with knowledge of, facts known only to the Directors of the Bank. While we deny the evidence in the Record justifies Respondent in his assumption as to the purpose of the withdrawal, we are willing to meet Respondent on the ground chosen by him, and, for the purposes of the argument only, to assume that the purposes of the withdrawal are as he contends.

Ekstrom, President of the Joint Company and Director of the Bank, did not, by the withdrawal, prefer himself, for he had no right or title to the deposits of the Joint Company. The most that can be claimed by Respondent is that Ekstrom, a Director of the Bank, "tipped off" to the Joint Company, information that he, as a Director of the Bank, should not have disclosed, and thereby the Joint Company was given advantage over other depositors. Or, to state it another way, that Ekstrom, by means of his

knowledge, so arranged it that his principal (the Joint Company) could take advantage of his knowledge and secure a preference over other creditors. So far as we are aware, no Federal Court has held that, under the circumstances of this case, in the absence of a Statute to the contrary, a depositor in a National Bank, or a contract creditor of any corporation, is incapacitated from receiving payment of his debt, because he has received inside information as to the possible financial embarrassment of his debtor.

It must be borne in mind in the consideration of this question that the Manufacturers Bank at the time this payment was made was a going institution, with no intention of retiring from the business for which it was organized. It may have been in unhappy financial circumstances. Its assets may not have been liquid, but there is not a scintilla of evidence that it was insolvent in the sense that its liabilities exceeded its assets, and the proof is clear that it was able to, and did, meet all the claims made upon it up to the time its Directors voted to turn the Bank over to the Comptroller for liquidation. It is conceded, and so found by the District Court, that the Bank had not committed any act of insolvency prior to the time the payment in question was made.

Now, suppose all the contentions of Respondent are true, and laying aside for the moment the provisions of R. S. 5242, what equitable or common law principle was violated by the payment made by the Bank to the Joint Company of a *bona fide* debt which the Bank owed to the Company?

Respondent urges that that line of authority which adheres to the doctrine that when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stock-

holders and creditors, and that its officers immediately, upon insolvency, become trustees of the assets of the corporation, charged with the duty of ratably distributing its assets among its creditors, is applicable, and if we correctly understand the position of Respondent, this trust fund principle should be carried to the extent, by the Courts, without statutory authority, that any preference to a *bona fide* creditor of a corporation after its insolvency, or at a time when its insolvency is imminent, especially if brought about through the assistance of a Director of a corporation, is fraudulent and void. This principle has frequently been argued to this Court and, so far as our diligence has advised us, this Court has never accepted it as sound. In the case of *Sanford Fork and Tool Company* v. *Howe & Company,* 157 U. S. 312, which was a bill in equity to set aside a mortgage given by a corporation, shortly prior to its insolvency, to certain of its Directors to secure endorsements of the Directors of prior indebtedness of the corporation and to bolster up the credit of the corporation by securing renewals of such prior indebtedness of the corporation which the Directors had guaranteed, the mortgage having been authorized by a vote of the stockholders, Mr. Justice Brewer, speaking for this Court, in that case, used the following language (317):

> "The case involves no breach of trust on the part of the agent toward the principal, but more closely resembles the case of an individual debtor giving preference to certain of his friends, and the general rule is that, in the absence of a Statute, a debtor has such *jus desponendi* in respect to his property that, although insolvent and contemplating a cessation of business and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment."

If this announcement of the law by this Court is applicable to the case at bar, then the question is determined. If the so-called "trust fund doctrine" or any other equitable

principle will prevent a corporation debtor from preferring one creditor to another, then it cannot be said that a corporation has such *jus disponendi* in respect to its property as an individual possesses. A corporation becomes insolvent just when an individual becomes so,—when it is unable to pay its debts from its own means as they become due.

The above case is not the only case in which this Court has been called upon to apply the so-called "trust fund doctrine". The "trust fund doctrine", as applied to the assets of corporations, solvent and insolvent, was fully discussed and explained by Mr. Justice Brewer in *Hollins* v. *Brierfield Coal & Iron Company,* 150 U. S. 371, and the determination of this Court is thus stated:

> "The expression, often used, that the property of a corporation constitutes a trust fund for its creditors, only means that when the corporation is insolvent, *and a Court of equity has possession of its assets for administration,* such assets must be apportioned to the payment of its debts before any distribution to its stockholders; but as between the corporation itself and its creditors, the former does not hold its property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor." (Italics ours.)

Substantially the same language was used by this Court in *Graham* v. *La Crosse & M. R. Co.,* 102 U. S. 148, and in *Fogg* v. *Blair,* 133 U. S. 534, and in *Wabash, St. L. & P. R. Co.* v. *Hane,* 114 U. S. 587.

To determine in this case, irrespective of R. S. 5242, that the payment by the Bank to the Joint Company, under the circumstances shown by this Record, was an unlawful or fraudulent preference, would require, we believe, this Court to hold that some lien exists in favor of all creditors of an insolvent corporation, and to overrule its holdings in the above cases which have stood as the law of this

Court for nearly forty years. If the decisions of this Court in the above cases were founded on reason, and are applicable to the facts in this case, then the principle announced in those cases should be followed by this Court unless there is some grave reason for departing therefrom. This trust fund theory seems to have a singular fascination to Respondent and we concede that throughout the various State Courts there is some diversity of opinion as to its application, but there is no diversity of opinion in the decisions of this Court. We also appreciate that in many of the States which recognize the general right of a corporation, solvent or insolvent, to make preferences among its creditors, such preferences in favor of its own Directors on account of antecedent indebtedness, in the absence of special equities, are not sustained, and we have no fault to find with these holdings. But that principle has no application to the facts in the case at bar, for:

(a) The depositor to whom payment was made (the Joint Company) was neither an officer or director of the Bank.

(b) The Joint Company was a *bona fide* depositor in the Bank and, in making the payment to a *bona fide* depositor, the Bank was but carrying out the obligation that it legally owed the depositor, *i. e.*, to pay it on demand.

(c) There is no proof of any kind that the Manufacturers Bank was actually insolvent when the payment in question was made.

(d) The Bank had not ceased the business for which it was organized, nor was there any expectation on the part of its managing officers to cease continuing its business. The most that can be said is that the proof tends to show that, in the opinion of a Bank Examiner, but not in the opinion of the officers of the Bank, the Bank was faced with a probable run, which it might not be able to withstand.

(e) The Bank was keeping open, receiving deposits and meeting its obligations on the whole of the day the payment was made.

(f) There was no maturing obligation of the Bank which the officers knew it was unable to meet at the time the check in question was paid.

(g) Had the Bank refused to honor the depositor's demand, such refusal would have been an act of insolvency which would have been sufficient to end the business of the Bank.

(h) At the time of the payment the Bank was in complete control of and had title to its assets, and control thereof or title therein was neither in a receiver appointed by the Comptroller, or by a Court of equity.

It may be that in addition to the above facts Respondent will claim that some of the assets of the Bank had been severely criticized by the Comptroller, and that for several months previous to the payment in question the condition of the Bank had not been, in the opinion of the Comptroller, healthy; that the Bank was on a special list to be examined by the Comptroller every thirty days; that *in the opinion* of the Comptroller many of its assets were slow, some doubtful, and some appeared to be to him to be desperate, and that it was the *opinion* of the Comptroller that the Bank could not long function unless additional security was obtained or the criticized assets collected, and we concede, if the testimony offered was competent, there was such testimony, but there is no proof that the Bank, at the time these payments were made, had not complied with the demands of the Comptroller, and there was absolutely no proof made, or attempted, that the Bank was insolvent in the sense that its liabilities exceeded its assets, and the proof is clear, and the District Court so found, that it was able to and did meet all demands made upon it as they matured. While we believe the question has been authoritatively decided by this Court and there is no necessity for citing decisions of State Courts upon the question, yet to the extent of being perhaps justifiably criticized for

prolixity, we call the Court's attention to a few of the decisions of the State Courts definitely deciding this question. In *Van Alstyne* v. *Cook,* 25 N. Y. 489, the Court, in speaking of the assets of a solvent, limited partnership, said:

> "They are trust funds when the Courts of equity are properly appealed to in behalf of the partners, or any partner or creditor, to protect and distribute the same upon equitable principles, and on such application assert the control over them. They are not trust funds in the hands of the partners any more than ordinary partnership property."

In *Tower* v. *Bank of River Raisin,* 2 Dougl. (Mich.) 530, it was held that a corporation has the same right to prefer one creditor over another that an individual has. This was followed in *Kendall* v. *Bishop,* 76 Mich. 624, and again in the case of *Bank of Montreal* v. *J. E. Potts Salt Company,* 90 Mich. 345, where it was held that:

> "A corporation may, *in the absence of legislative restriction,* deal with its property precisely as an individual may, and may prefer one creditor over another; and hence the assets do not become a trust fund for *pro rata* distribution among all its creditors, until such time as steps are taken under the 'closing up act'."

This trust fund doctrine is luminously described by Judge Mitchell in *Hospes* v. *Northwestern Manufacturing and Car Company,* 48 Minn. 174, who demonstrates, *unless prohibited by Statute,* an insolvent corporation has the same right as an individual to prefer creditors, and that there is no solid foundation for the doctrine that the insolvency of a corporation has the effect of converting its assets into a "trust fund", in any proper sense of the term. In *Catlin* v. *Eagle Bank,* 6 Conn. 235, the Court holds that the mere insolvency of a corporation neither impairs its power to manage its affairs, nor converts its property into a trust fund for the benefit of its creditors. And this was

reiterated by the Supreme Court of Connecticut in the case of *Pondville Company* v. *Clark*, 25 Conn. 97. In the former case the Court discussed the question at great length. In the course of its opinion it says:

> "The cases of an individual and of a corporation in the matter under discussion, it appears then, are not merely analagous but identical, and I discern no reason for the slightest difference between them • • •. The insolvent banking corporation is just as much a trustee of its creditors, and no more, as the insolvent individual is a trustee of his creditors."

The same doctrine as to when the assets of an insolvent corporation become trust funds was declared by the Supreme Court of Missouri in *La Grange Butter Tub Company* v. *National Bank of Commerce*, 122 Missouri 154. That Court said:

> "In case of an insolvent corporation a Court of equity will make distribution of the corporation assets *pro rata* among the corporation creditors, and to that end will regard the corporation property as a trust fund. It is in this sense, and upon this principle, that the assets are trust funds. *They are trust funds when a Court of equity is appealed to in behalf of any member of a corporation or creditors to protect and distribute the assets upon equitable principles.*"

And again in *Alberger* v. *National Bank of Commerce*, 123 Missouri 313, Judge Barclay, in speaking of the notion that insolvency transforms the assets of a corporation into a trust fund, said:

> "This theory seems to have a singular fascination to some learned jurists, but, in our opinion, it is wholly untenable as applied to the facts of such a case as that before us, under the law of Missouri."

And, after a very thorough and instructive discussion of the question, he concludes that:

> "The creditor of a corporation has the same right to secure, by superior diligence or persistency and to retain, a preference for his claim against a private corporation, that he would have were his debtor an indi-

vidual engaged in the same line of business, provided, always, that the transaction is honest,—that is to say, not a mere cover to a purpose to hinder, delay or defraud other creditors of the failing debtor."

Such is also the declared law of the State of New Jersey in *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 640. The Court said:

> "If there be no legislative prohibition against the transfer of corporate property or its use in preferring creditors after insolvent, no reason can be given why such transaction should be invalidated, which would not also invalidate the like transaction of individuals. Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors although it is insolvent, unless such conduct is prohibited by law."

The Supreme Court of Arkansas in the case of *Worthen* v. *Griffith*, 59 Ark. 562, holds the same way and that:

> "It is only when a Court of equity at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of an insolvent corporation, that its assets may in this State be properly said to be a trust fund for its creditors."

The same question as to the right of an insolvent corporation to make preferences was before the Court in *Gould* v. *Little Rock, M. R. & T. R. Co.*, 52 Fed. Rep. 680. In that case Judge Caldwell said that it was the settled law in Arkansas (from which State the case came) that it might lawfully do so, and added this significant statement:

> "The established rule in that State is in harmony with the general, though not quite universal current of authority on this question."

After citing a large number of supporting authorities he adds:

> "The cases which hold the contrary doctrine are bottomed on the erroneous theory that the insolvency of a corporation in effect dissolves it and makes the Directors mere trustees to distribute the assets ratably among its creditors. It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts; but this rule means no

more than that the property of the corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of a corporation is applied to the payment of any of its *bona fide* debts. The rule, as has been often pointed out, does not prevent a corporation, whether solvent or insolvent, from making a preference among its creditors, and exercising in good faith absolute dominion over its property in the conduct of its legitimate corporate business, so long as its right to do so is not restrained by Statute or judicial proceedings."

The Supreme Court of Alabama in the case of *O'Bear Jewelry Co.* v. *Volfer,* 100 Ala. 205, 28 L. R. A. 707, uses the following language:

"There is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relation to the creditors of such corporations as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual or partnership, and is or is not to be impressed with a trust character upon the circumstances and under the same conditions in the first case as in the latter two."

In the case of *Thompson-Howard Electric Light Co.* v. *Henderson Electric & G. L. Co.,* 21 S. E. 951, the Supreme Court of North Carolina deliberately reversed a former holding sustaining the trust fund theory and declared generally that the relation between a corporation creditor and the corporation, whether solvent or insolvent, is simply that of creditor and debtor, and that the creditor had no equitable claim upon the corporation assets either because it was a corporation or because it was insolvent. The Supreme Court of Indiana, in the case of *First National Bank* v. *Dovetail B. & G. Co.,* 143 Ind. 550, 40 N. E. 810, announces that the law of Indiana is the same. In the State of Illinois, where this case arose, a case analogous to the case at

bar was decided by that Court and the trust fund doctrine repudiated. The case of *Rockford Grocery Co.* v. *Grocery Company,* 175 Ill. 89, was a case where the Grocery Company borrowed money of a Bank, which indebtedness was guaranteed by its Directors. Thereafter, it became insolvent and by authority of the Directors a judgment note was given the Bank in lieu of the original note, on which judgment was at once taken and the property of the corporation sold. Another creditor recovered judgment thereafter and, on writ of execution returned *nulla bona,* filed a creditor's bill against said Directors seeking to hold them personally liable for a breach of trust, setting up the foregoing facts, and alleging fraud in giving said judgment note, while said corporation was known to them to be insolvent, for the purpose of preferring the Bank, and through it the Directors, over other creditors. The Supreme Court of Illinois said (p. 92):

> "The corporation being insolvent and the Directors being guarantors of said debt, were they at such time legally authorized to give such preference? The principle is firmly established, that *in the absence of statutory prohibition,* an insolvent corporation can prefer its creditors the same as any individual, which preference, of course, is given by the action of the officers of the corporation. The law is, however, that an insolvent corporation cannot prefer a creditor who, at the time, is a Director therein. Is the creditor deprived of the legal right of this preference by reason of the fact that such debt of the corporation is guaranteed by one or all of the Directors? * * * For, if the Directors, in such case, have no legal right to give, the creditor has no legal right to receive, such preference. One proposition is necessarily the corollary of the other, for the element of fraud is involved in such preference, if illegal * * * The Directors were not the creditors of the corporation and were not primarily standing in that relation to it. The creditor loaned the money to the corporation in good faith, while solvent and a going concern, and the money so obtained was used for its benefit. On no principle of law or reason can such

creditor be deprived of its right to a preference merely because the Directors guaranteed the debt. * * * It necessarily follows that fraud could not be predicated on the act of the Directors in giving this judgment note to the Bank, which resulted in a preference to it, as a creditor, in the distribution of the assets of said corporation."

In the case of *Wheeler* v. *Matthews*, 70 Fla. 317, 70 So. 416, the Supreme Court of Florida, speaking through Judge Ellis, said:

"While the officers of an insolvent corporation are referred to as trustees of the corporation's creditors in the case of *Southern Life Ins. Co.* v. *Lanier*, 5 Fla. 110, we do not conceive the meaning of the Court to have been that the assets of an insolvent corporation become immediately upon its insolvency a trust fund or estate, as to which the corporation or its officers become the trustees and the creditors of the corporation the *cestuis que trustent* thereof; that by the mere act of becoming insolvent the assets of the corporation which were not charged with any trust before were changed into a trust fund or estate for the benefit of the corporation's creditors, so that it may be administered as such by a court of equity. This doctrine which is said to have originated in a decision by Judge Story in *Wood* v. *Drummer*, 3 Mason 308, Fed. Case No. 17944, has never been adopted in this State. The assets of an insolvent corporation may not be distributed among the shareholders without first providing for the corporate debts. To this extent only it may be said that the officers of an insolvent corporation are trustees of its creditors. When a court of chancery upon some recognized principle of equity jurisdiction takes possession of the insolvent corporation's assets, it will administer them on the theory that in equity they belong to the creditors rather than to the corporation. *Graham* v. *R. R. Co.* 108 U. S. 148; *Fogg* v. *Blair*, 133 U. S. 534 (541); *Hospes* v. *N. W. Mfg. & Car Co.* 48 Minn. 174; *O'Bear Jewelry Co.* v. *Volfer*, 100 Ala. 205."

A corporation, although it may be hopelessly insolvent, and although it may be about to go into the hands of a receiver, or to assign for the benefit of creditors, or may be

in the act of making an assignment, has the same power as a natural person to prefer one or more creditors to the exclusion of others, *unless it is prevented from doing so by some express statutory provision.*

3 Clark & M. Corp. p. 2365, Sec. 780.
Tiffany Bank & Banking, p. 346.
Merced Bank v. *Ivett*, 127 Cal. 134, 59 Pac. 393.
2 Bolles Banking, p. 803.
Grand De Tour Plow Co. v. *Rude Bros. Mfg. Co.* 60 Kas. 145, 55 Pac. 848.
Ames & T. Co. v. *Heslet*, 19 Mont. 188, 61 Am. St. Rep. 496.
Warfield, H. & Co. v. *Marshall Canning Co.* 72 Iowa 666, 2 Am. St. Rep. 263.
Blair v. *Ill. Steel Co.* 159 Ill. 350.
West v. *Hanson Produce Co.* 6 Colo. App. 467.
National Bank v. *Scott & Co.* 18 Utah 400.
Colorado Fuel & Iron Co. v. *Western Hardware Co.* 16 Utah 4, 50 Pac. 628.
Levering v. *Brinck*, 146 Ind. 545, 45 N. E. 775.
Slack v. *Northwestern Nat. Bank*, 103 Wis. 57, 74 Am. St. Rep. 841.
Wilson v. *Baker Clothing Co.* 25 Idaho 378, 50 L. R. A. (N. S.) 239.
O'Brien, Receiver, v. *East River Bridge Co.* 161 N. Y. 539, 48 L. R. A. 122.
Livingston v. *Columbian Banking Co.* 81 S. C. 244, 22 L. R. A. (N. S.) 445.

A preference is an advantage and to be a prohibited preference it must either be one which contravenes some equitable principle or violates some positive statutory provision. In neither instance can it exist if there is no insolvency, because if there is no insolvency there can be no inequality in the payment of creditors, and without inequal-

ity there is no advantage. At the foundation of the investigation, therefore, lies the inquiry whether on June 13, when the check in question was paid, the Manufacturers Bank was insolvent. But before this inquiry can be answered accurately or intelligently, it is necessary that there should be a clear understanding of what is meant by the term "insolvency". If insolvency means a condition where liabilities are greater than the value of assets, then there is no proof in this record of any kind or character that the Bank was insolvent, unless it can be said that the *opinion* of the Comptroller, founded on the *opinion* of the Examiner, as to the value of assets, is sufficient proof in such a case as this to prove that fact. Such a test of insolvency, however, would wreck a large proportion of flourishing Banks, because there were few Banks in the year 1931 whose assets were not to some extent depreciated, slow or frozen or subject to criticism by the Comptroller. But, if insolvency means merely an inability to pay debts when and as they mature, in the ordinary course of business, then the Bank was not insolvent at the time this payment was made, nor was it insolvent when the Directors of the Bank passed the Resolution to close its doors.

If there is credence to be placed in human testimony, not an Officer or Director of the Bank had any knowledge that the Bank was insolvent, in either sense of the term, at the time this payment was made. At the time that Baty, the Examiner, addressed the Directors of the Bank at the noon meeting of Jun 12, the President of the Bank, the Cashier of the Bank, the Vice President of the Bank, as well as Baty, the Bank Examiner, stated that, in their opinion, the Bank was solvent. On Sunday night, June 14, when the Bank Examiner demanded of the Directors that they pass the Resolution turning the Bank over to the Comptroller, every managing officer of the Bank who was present stated that in his opinion the Bank was solvent. The trust fund.

theory which Respondent invokes in this case has, as its foundation, the insolvency of the Bank. The Courts of those States, which adhere to the trust fund theory, state the rule to be that *when a corporation becomes insolvent* its assets in the hands of its officers become a trust fund for the benefit of its creditors, so that, applying the trust fund rule in its most liberal sense, it has no application in this case, because here there is no proof that the Bank was insolvent. The trust fund doctrine, which is the equitable principle relied upon by Respondent, is said to have had its origin in *Wodds case,* 3 Mason 308, Federal Cases No. 17944. But that was a contest between the stockholders and creditors of a Bank where the stockholders appropriated the assets to the exclusion of the creditors. But whatever the origin of the doctrine, it has never been viewed with favor by this Court. As we understand the opinions of this Court in the cases heretofore cited, it is only when the company has been dissolved or has become insolvent *and its assets are in the custody of a Court of equity,* or of an administrative officer of the Government, that this equitable doctrine arises. So long as the company is a going concern, having the possession and management of and title to its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals. When a corporation has ceased to be a going concern, when it has been dissolved, when its assets have been taken over by a Court of Equity in an appropriate case, or when its assets have been seized by an administrative officer of the government for liquidation in a certain way, when it has no longer the possession and management of its property, it may well be said that all its assets and property become a trust fund, and that its Officers and Directors become trustees for the benefit of its creditors. If the specific contention of Respondent, that the payment of the check in question was void, because of

some equitable prohibition against its payment, is sound, then the rule must be that if a corporate depositor in a Bank draws its check upon that Bank, and the check is paid in the ordinary and usual course of business while the Bank is a going concern, the payment of that check is a prohibited preference, if two days afterwards the Bank closes its doors and goes into liquidation, and if one of the signers of the check for the corporate depositor was a Director or Officer of the Bank. This contention, if sustained, makes the Bank or its Officers trustees for the creditors while the Bank is a going concern and while it is still solvent, and this Court has not, so far as we are aware, carried the so-called trust doctrine to that extent. Under the most rigid and extreme application of the trust fund doctrine, the Officers do not become trustees for the creditors, however they may stand toward the stockholders, until the corporation ceases to be a going concern, or at least until it is solvent. If this were otherwise, then no corporation would venture to be a depositor in a Bank of which one of its officers was a Director. There is no more reason for contending that the payment of the check in question constituted an unlawful preference by the Bank to the Joint Company, than there would be for challenging the validity of any payments made by the Bank to the Joint Company within two weeks prior to the payment in question. The mere proximity of the time of the payment to the actual suspension, can make no difference in the legal principle, if it be a legal principle, that such payments as these are preferences.

CASES CITED BY RESPONDENT.

The cases cited by Respondent to sustain his contention that the payment of this check constituted a prohibited preference, *at the common law,* irrespective of the Statute, are as follows:

American Surety Company v. *Jackson,* 24 Fed. (2) 768.

Federal Reserve Bank v. *Omaha National Bank,* 45 Fed. (2) 511.

Vann v. *Federal Reserve Bank of Richmond,* 47 Fed. (2) 786.

Corbin v. *Mumford,* 148 Fed. 37.

Swentzel v. *Penn. Bank,* 147 Pa. 153.

Lamb v. *Ulrich,* 94 Okla. 240.

First National Bank and Trust Company v. *Manning,* 116 Conn. 335.

The cases cited from the Federal Courts above noted, with the exception of *Corbin* v. *Mumford,* are all cases founded upon R. S. 5242. In every case the payment there held invalid was made *after the commission* of an act of insolvency and in some instances after the Bank was closed. In the case of *Corbin* v. *Mumford,* which was the decision of a District Court of Georgia, the action was brought by a Trustee in Bankruptcy to set aside a preference under Sections 60a-b of the Bankruptcy Act. The proceeding was purely statutory, and was an action brought by the Trustee to recover back a preference obtained by a creditor within four months of bankruptcy, and the Bankruptcy Statute in force at the time made the preference voidable or recoverable only upon the recipient of the preference having had reasonable cause to believe that it was intended thereby to give a preference. All that is said in the case is said with reference to the application of that Statute.—Section 60b of the Bankruptcy Act. We fail utterly to ap-

preciate how this case is any authority to sustain the proposition that the payment of the check in the case at bar was an unlawful preference at the common law. After discussing the other cases above cited, we will discuss the application of the rule in bankruptcy to a payment by a National Bank.

In *Swentzel* v. *Penn. Bank,* the money was drawn after the Bank had suspended payment, and was drawn by a depositor who was an Officer of the Bank. In the case of *First National Bank and Trust Company* v. *Manning,* the facts were as follows:

One Treat was Treasurer of Broadway Bank and Defendant Manning, who was Treat's mother-in-law, had an account in the Savings Department of the Bank, which was carried under the heading "Carrie Manning, R. V. Treat, Agent", the pass-book being in the possession of Treat, who had authority to sign withdrawal orders and manage the account. The Bank became insolvent in December, 1931, and on Thursday, December 17, a serious "run" started on the Bank, which continued on Friday, Saturday, Monday and Tuesday. On Tuesday, December 22, at ten minutes of three, no funds remained in the Bank, payment was suspended, and by order of the Bank Commissioner the Bank did not open the following day.

On Sunday, December 20, Treat visited Mrs. Manning, who told him she had read about the "run" on the Bank, requested him to look out for her money which she did not wish "tied up" in the event the Bank failed, and told him to withdraw it. Treat did not withdraw the money on Monday, but on Tuesday afternoon, *after he learned the Bank was about to close,* he directed a Teller to bring $500.00, the total amount of the deposit, and a withdrawal order, to his private office, and not to say anything about it, and thereupon withdrew the $500.00 and closed the account. At

the time there was a good deal of excitement at the Bank and a large number of depositors were in line waiting to make withdrawals at the regular windows, *many of whom were unable to procure their funds before the Bank suspended payment.* Treat knew that the Bank was insolvent and was about to close when he made the withdrawal, which he made *as agent and Treasurer of the Bank,* and as agent of Mrs. Manning. Commenting upon this evidence, the Supreme Court of Connecticuit said:

> "The trial Court's conclusions that the withdrawal of this deposit by Treat was made in contemplation of insolvency was justifiably based upon its finding that he knew that the Bank was insolvent and that it was about to close. The finding also supports the conclusion that the withdrawal was made with the intent to prefer the depositor, Mrs. Manning. *In making the withdrawal Treat was acting both as an official of the Bank and as an agent for his mother-in-law, Mrs. Manning.* His knowledge as such agent was her knowledge. The legal situation, therefore, does not differ from that which would have existed if, with knowledge that the Bank was about to close, he had withdrawn his own deposit, in which case the almost inevitable inference would be that it was done in order to obtain a preference over other depositors. Moreover, the withdrawal was not made in the ordinary course of business and was effected by the use of facilities not available to other depositors. It is true the Bank was then open for business and depositors were in line waiting to make withdrawals. Many of these, however, were unable to procure their funds before the Bank closed, while Treat, in his capacity as an official of the Bank, and with his knowledge that it was about to close, obtained immediate payment of this deposit to himself as agent of Mrs. Manning."

In the above case, a Statute of Connecticut was involved quite similar to R. S. 5242, and the real question there decided was that, because the payment was made in violation of the conditions of the Connecticut Statute, the transfer was an unlawful and preferential one which was

avoided. The case cannot be fairly cited as authority sustaining any common law or trust fund theory. The elements which appear in that case, which do not appear in the case at bar, are numerous. There, the Officer of the Bank who made the payment was an agent of the depositor and he made the payment to himself as agent of both parties. No such situation appears in the case at bar. In that case the payment was made at a time when the Officer of the Bank who directed it was fully aware that the Bank was on the verge of closing, and there is no question but that the Officer of the Bank who directed the payment did so for the purpose of preferring the depositor over other depositors of the Bank. That situation does not appear in the case at bar. In that case there was a run on the Bank and the depositors were standing in line waiting their turn to get to the paying window. Mrs. Manning was not in line. Although she had directed the withdrawal of her money on Sunday, Treat, her agent, did not withdraw it until it became apparent to him that there were not funds enough in the Bank to meet the demands of the depositors who were then lined up in front of the paying windows. And, too, for the purpose of preferring Mrs. Manning, Treat, the Officer of the Bank, paid this money, not in regular course of business through the Bank's paying windows, but effected it by use of facilities and advantages which he, as an Officer of the Bank, possessed, over the demanding depositors who were at the Bank's windows. Whatever may be said of the opinion of the Supreme Court of Connecticut in the Manning case, it is neither authority for Respondent to sustain the principle for which he cites it, nor is it, on the facts, analagous to the case at bar. The case of *Lamb* v. *Ulrich,* 94 Okla. 240, cited by Respondent, while presenting some facts similar to the case at bar, has just enough other facts to clearly distinguish it, and it is apparent from the opinion that these other facts are the facts

which influenced the Court. The following facts in that case, but not in this, appearing:

1. The depositors were stockholders of the Bank.

2. The payment was not a usual withdrawal by a depositor, but was a trading of securities in payment of the checks of certain depositors, at a time when the depositors knew the Bank was having a hard time and when the depositors stated that they wanted to put their money in something they could get their money out of in case they wanted it.

3. That the transaction was an unusual one and not in regular course of business of the Bank, the Cashier of the Bank testifying that such a transaction had never occurred before in his ten years of banking experience.

The above case was not founded upon any equitable principle. It was a suit in a State Court by a Receiver of a National Bank to avoid a transfer of securities made by the National Bank to certain of its depositors and was founded upon R. S. 5242.

The case of *Rice* v. *City of Columbia,* 143 S. Car. 516, also cited by Respondent, is a case which applies the trust fund doctrine which this Court has so frequently repudiated, that it seems of little avail to discuss that case.

Reverting now to the case of *Corbin* v. *Mumford,* 148 Fed. 37, which Respondent claims is authority that the payment of the check in question constituted a prohibited preference at common law, we have only to state that the case does not so determine. The case was brought in 1906 by a Trustee in Bankruptcy to set aside an alleged unlawful preference under the Bankruptcy Act of 1898, and as the effect of Section 60b of the Bankruptcy Act was that the preference could only be avoided if the person receiving the preference had cause to believe it was intended as a preference. If he did not have cause to believe to so believe he could keep the property transferred to him. (*Pirie* v. *Chicago Title & Trust Co.* 182 U. S. 438, 447.) The Court dis-

cusses at great length in the *Corbin* case the knowledge and purpose of the recipient of the payment. As before stated, as the case was founded on a Statute, and the relief sought grounded on a Statute, nothing that the Court said has any application to the right of a debtor at common law to prefer a creditor.

THE RULE AND STATUTE IN BANKRUPTCY HAS NO APPLICATION TO THE CASE AT BAR.

As Respondent has indicated in his reply to Petition for Certiorari in this case, that the lawfulness of a preference at common law must be read, since 1898, in connection with the Bankruptcy Statute, we will answer that suggestion at this point. As we understand Respondent, it is his claim that, analagous to the rule and Statute in Bankruptcy, the *intent* of the *recipient* of the payment is controlling. It is not necessary to remind this Court that the Bankruptcy Act has no reference to National Banks. Banks are expressly excepted from the operation of the Bankruptcy Act by Section 22 thereof. Although Section 60b of the Bankruptcy Act provides that if the creditor receiving the payment has reasonable cause to believe that a preference would be thereby effected, the payment may be avoided as preferential, Congress has imposed no such condition to a payment made by a National Bank while the Bank is in control of its assets, and certainly it cannot be urged that Congress does not have the right to provide for the avoiding of preferences in the case of National Banks by one rule and of avoiding preferences by Bankrupts, other than National Banks, by another rule. And Congress has done so. The statutory provisions relative to avoiding of preferential payments by National Banks were contained in the original National Bank Act of June 3, 1864, (13 Statutes 115), and although Section 5242 has been amended slightly,

in substance it stands as originally enacted. It antedates by many years the Statutes avoiding preferences contained in the Bankruptcy Act of 1898, and there is nothing in the Bankruptcy Act or any of its amendments which indicates that it was the intention of Congress by the Bankruptcy Act to amend, alter or change the definitions of voidable preferences contained in the National Bank Act. The Bankruptcy Act and the decisions under it are to be excluded from thought.

It is not improbable, however, that the Circuit Court of Appeals, and the District Court, had in mind the fact that the voidability of a preference in bankruptcy is determined by the intent of the payee, and that they inadvertently applied that rule in this case, for the Circuit Court of Appeals in its opinion (R. 234) states:

> "The Court found that prior to the payment of the controverted check, the Bank had committed no act of *bankruptcy.*" (Italics ours.)

Of course, this was a slip of the pen by the writer of the opinion. The District Court had made no reference to "bankruptcy" in its finding, but it is obvious that the writer of the opinion of the Circuit Court of Appeals had the rule of preference in "bankruptcy" in mind and applied it, for it held the intention of Ekstrom, to benefit the recipient of the payment, as sufficient to avoid the payment, as did the District Court and based affirmance of the decree on that ground.

R. S. 5236 IN NO WAY CHANGES THE RULE, BECAUSE THAT SECTION HAS REFERENCE ONLY TO THE DISTRIBUTION OF ASSETS OF A BANK AFTER THE ASSETS ARE SURRENDERED BY THE CORPORATION TO THE COMPTROLLER, AND AFTER THE LATTER HAS LIQUIDATED THE SAME.

It is contended by Respondent that, because of R. S. 5236, that Congress has announced that it is the general public

policy of the nation that assets of an insolvent Bank should be *prorated* among depositors, and that therefore this Court is justified in inaugurating a principle of law or equity to carry out the public policy of the nation as expressed in its Statutes, and to set aside every transaction, whenever made, which will defeat that policy. A full and complete answer is that R. S. 5236 has no application to the assets of a National Bank, until *after* the Comptroller has taken possession of the assets of the Bank and is in process of liquidating the same. The Statute has no reference to assets of a Bank in possession of the Bank while the Bank is conducting its business and before the Comptroller has seized its assets and appointed a Receiver. The assets of a National Bank in the hands of a Receiver, appointed by the Comptroller, are a trust fund in the same sense as are the assets of a corporation after a Court of equity has taken hold of the same in a proper proceeding. But prior to the appointment of a Receiver by the Comptroller, and during the time that the Bank is in operation and in the conduct of its business and is a going concern, the Bank, and not the Comptroller, has the control of its assets, and no Statutes have been enacted by Congress except Section 5242 which in any way attempt to control the matter of preference *prior to* the appointment of a Receiver. There being no Statute which changes the common law on the subject, and the law being that a preference by a corporation to a *bona fide* creditor is legal, unless prohibited by Statute, the question is whether this Court deems this case of such great moment that it will overrule its repeated decisions and initiate a rule of law to avoid such preference. Such an argument was made to the Supreme Court of Iowa and was answered by Judge Dillon in the case of *Buell* v. *Buckingham*, 16 Iowa 284; 85 Am. Dec. 516, wherein he says:

> "The rule should be declared by the legislature, which has the constitutional power to make and change the law, and not by the Courts, which have no such power."

A very complete annotation on the legality of a preference among creditors given by an insolvent corporation is found in the note to *Lyons-Thomas Hardware Co.* v. *Perry Stove Manufacturing Co.*, 22 L. R. A. 802, where many cases to which we have not referred are cited and the conclusion arrived at by the compiler of the note is thus stated:

> "On examination of the decisions, it is clear that the weight of authority is overwhelmingly in favor of the legality of a preference to ordinary creditors, *except as restricted by Statute*, and overwhelmingly against the validity of such preferences when made in favor of Directors."

At common law the diligent creditor has always been favored. The diligent creditor, we apprehend, is one who closely scrutinizes the actions and business of his debtor, who has his eyes and ears open to see or hear evidences of financial embarrassment on the part of his debtor. He has a right to act upon the information he receives and the facts as he discovers them. If a creditor enjoys a favored position, as if he has an agent who is a Director of a corporation which is his debtor, he has the right to know what his agent knows. If his agent makes an honest disclosure to the principal of facts which come to him at a Directors' meeting, his principal has a lawful right to receive that information and act upon it.

Respondent cites the cases of *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 and *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216 (266) as holding that R. S. 5236 establishes by Federal Law a system of equal distribution of assets of National Banks and he argues that said Section prevents a Bank, when it is in control of its assets and functioning as a Bank, and before the appointment of a Receiver, from lawfully preferring a creditor, and in the Court below he attempted to build up an argument founded upon the proposition that the Court should, in some way, inaugurate a rule of equity to carry out the public policy of the Nation, as

expressed in R. S. 5236, and he cites the above cases as authority for the proposition that Congress has by R. S. 5236 attempted to announce the public policy of the Nation as to the handling of assets by a Bank *before* a Receiver is appointed. Respondent misapprehends the effect of those decisions, and forgets to read the statements of this Court in the light of the facts this Court was there considering. Neither of those cases involved the validity of a preference made by a Bank to its creditor, at a time when the Bank had control of its assets and *before* the assets were taken over by the Receiver appointed by the Comptroller. In the *Davis* v. *Elmira Bank* case a savings bank depositor, *after the appointment of a Receiver,* asserted a preference because a statute of New York provided that it shall be the duty of

> "the trustee, assignee or receiver of any Bank or trust company which shall become insolvent" to apply the assets received by him, "in the first place, to the payment in full of any sum or sums of money deposited therewith by any savings bank", etc.

Suit was brought, in the State Court, by the Elmira Savings Bank, *against the Receiver of a National Bank,* to have the Court adjudicate the preference and to require the National Bank Receiver, in the distribution of the assets in his hands, to first pay the Elmira Bank in full before he made ratable distribution to the general creditors. All this Court held in that case was that the Act of Congress, R. S. 5236, took precedence over a State Statute, in case of conflict or repugnancy, where the distribution was of assets of a National Bank. It is clear that this Court, in its discussion, was confining its decision to a distribution *after,* and not *before,* the assets came into the hands of the Receiver, for this Court says (top of page 284) in discussing the application of the State and Federal Statutes:

> "Both" (Statutes) "cover the assets of such Banks *coming, after insolvency, into the hands of the Officer or person authorized to administer them.*"

In the case of *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, the contest as in the *Davis* case was by a creditor of a National Bank, *after* the assets were in the hands of the Receiver of a National Bank, to impress a trust upon funds *in his hands* in favor of the U. S. F. & G. Co., and to require the Receiver to prefer said company in the distribution of assets in his hands, before making ratable distribution to the other general creditors. It was there claimed the trust arose because of an Indiana Statute known as the Bank Collection Code. This Court held that, as applied to the distribution of assets of a National Bank, *in the hands of a Receiver*, that such Code was in conflict with and repugnant to R. S. 5236 and therefore was superseded by the latter, or as Justice Cardoza so aptly worded it on page 226:

> "As applied to a National Bank, the preference is plainly inconsistent with the system of equal distribution established by Federal Law R. S. 5236."

Both of the above cases were suits brought *to enforce* a preference to assets in the hands of a Receiver of a National Bank. Here the case is one of a Receiver seeking to *set aside* a preference given by the Bank when the assets were in its hands, and before the same had come into *custodia legis*. And the Congress has not provided against preferences given by a National Bank while the assets are under its control except by R. S. 5242, and R. S. 5236 has no application.

If the *payment* involved in the case at bar was made at a time and under circumstances inhibited by R. S. 5242, that is an end of the matter and the decree below was right. If, on the other hand, as we most earnestly insist, the payment was not made at a time or under circumstances condemned in R. S. 5242, then there is neither equitable nor common law ground for avoiding the preference and R. S. 5236 has no application.

Much has heretofore been said and no doubt will be said

by Respondent concerning the abuse by Ekstrom of a fiduciary relation. It is claimed that Ekstrom received his information as to the condition of the Bank at a Directors' meeting and, that because thereof, his information was confidential and his mouth, in equity, should be sealed. We know of no such law. Ekstrom was a Director of the Bank. He was also the President of the Joint Company. There was no secret about this dual relationship. The Bank knew it. Presumably the depositors knew it, and presumably the Joint Company knew of it. It is not at all unlikely that Ekstrom was selected as a Director of the Bank by the stockholders in order to attract deposits from the Joint Company. Was it any breach of morals or confidence for Ekstrom, if he honestly believed the Bank sound, to advise the Joint Company of his belief and of the facts upon which he based his belief, even though those facts should have been disclosed at a Directors' meeting, in order to induce the Joint Company to make deposits at the Bank? Surely no one could honestly contend that there was any breach of confidence in such a situation. Why then, when Ekstrom learned at a Directors' meeting that conditions in banking circles were such, that in the opinion of a Bank Examiner the Bank might suffer a run which it possibly might not be able to withstand, can it be said that he committed any fraud or breach of confidence if he told his employer, the Joint Company, what he had heard? It seems to us that Respondent's arguments concerning the duty of Ekstrom to keep as confidential any information which he received in his capacity as a Bank Director, is not consistent. He claims now that Ekstrom knew from information conveyed to him by a Bank Examiner at a Directors' meeting of the Bank that the Bank was facing a run which would possibly wipe it out. He claims that, in addition to this, Ekstrom knew from letters and reports sent to him by the Comptroller of the Currency that the Bank was in a precarious situation

for many months prior to the withdrawal in question. He seriously urges that because of the facts conveyed to Ekstrom at the Directors' meeting, coupled with the knowledge that Ekstrom had, as a Director of the Bank, of facts which had been conveyed to the Directors by the Comptroller, that it was a breach of confidence for Ekstrom to reveal this information to a Company of which he was President, and that Ekstrom should have, in equity kept this information secret from the Joint Company, The stockholders of the Bank were in no way effected by anything that Ekstrom, as a Director, disclosed. The stockholders of the Bank had made Ekstrom a Director. The creditors had taken no part in his selection, and he owed no duty to the creditors, except to see that the assets of the Bank were applied to the payment of its debts before any distribution was made to stockholders. Neither the stockholders, nor the Bank, were concerned in the slightest with the question as to whether the assets were pro rated among the creditors. It will be noted that deposits, far exceeding the amount of the check withdrawn, were made by the Joint Company, in the Bank, after the last communication that had been made by the Comptroller to the Directors of the Bank, and Respondent argues and will argue that because Ekstrom was a Director of the Bank and knew what the Comptroller thought about the situation of the Bank that he should have conveyed that information to his employer, the Joint Company, and that the Joint Company is chargeable with that knowledge, and with such knowledge saw fit to deposit its money in an insolvent Bank when it made the deposits, and chose to do so. These arguments are not consistent. If the information which Ekstrom received at a Directors' meeting from an agent of the Comptroller coupled with knowledge coming directly to him from the Comptroller is so sacred and confidential that it would be a fraud on Ekstrom's part for him to convey that informa-

tion to the Joint Company, then certainly the information which he received directly from the Comptroller, by letters and reports of examination, are just as sacred and just as confidential, and if it was the duty of Ekstrom to keep in confidence the information which he received from the Comptroller as to the condition of the Bank, and it was a fraud to divulge that information to the Joint Company, then certainly there can be no presumption that the depositor, the Joint Company, knew what the Comptroller had said about the Bank, even though Ekstrom was the President of the depositor. This brings us to the next question.

COUNTERCLAIM.

If the letters from the Comptroller to the Directors, accompanying the reports of examination of the Bank for December and May were competent in evidence, and if the effect of such letters and reports was competent and sufficient proof that the Bank was insolvent during the period from December to May, then we have a situation where the Joint Company has deposited large amounts of money during the month of June, and which, if made in a Bank at a time when the officers of the Bank knew that the same was hopelessly insolvent, were fraudulently received by the Bank, unless the depositor had equal knowledge of the condition of the Bank. The proof in this record is clear and uncontradicted that the Joint Company had no knowledge of the condition of the Bank unless the knowledge of Ekstrom, its President, was constructive notice to the Bank of all that Ekstrom knew. Respondent argues that the Joint Company is presumed to have had all the knowledge that Ekstrom, its President, had, even though the knowledge to Ekstrom came to him in confidence. In other words, in the one instance Respondent charges Ekstrom with a fraud and a breach of confidence of such a serious character as to jus-

tify a Court in decreeing that Ekstrom make restitution of the fund, for doing what amounts to giving notice to the Joint Company of what Ekstrom had heard at a Directors' meeting of the Bank concerning its condition. And, on the other hand, asking this Court to dismiss the counterclaim on the ground that Ekstrom's *duty was to convey* the information which he received from the Comptroller to the Joint Company, which was at least equally confidential.

(C)

WAS IT PERMISSIBLE FOR PLAINTIFF, IN THE COURT BELOW, TO JOIN IN ONE CAUSE OF ACTION IN EQUITY A COMPLAINT AGAINST A DEPOSITOR FOR RECEIVING A PAYMENT OF MONEY ALLEGED TO BE VOID UNDER R. S. 5242, AND IN THE SAME ACTION TO SEEK TO RECOVER FROM A DIRECTOR OF THE BANK FOR AN ALLEGED VIOLATION OF A COMMON LAW DUTY?

Respondent claims that his Bill of Complaint was double, *i. e.*, that it charged not only a violation of R. S. 5242, but also charged the violation of some common law or equitable principle making it inequitable or unlawful for the Joint Company to receive a preference, and unlawful or in violation of some confidence for Ekstrom to aid the Joint Company in securing the preference. It may be that the Bill of Complaint is of such a character. The Circuit Court of Appeals held it was, and intimates it affirmed the decree of the District Court, not because of the violation of a statute making the preference unlawful, but because of a violation of the supposed common law duty, namely, that "Ekstrom occupied a dual and confidential relation with reference to said Manufacturers Bank and the Joint Company, and that he used information which he gained in confidence at a meeting of the Directors of the Manufacturers Bank, to the wrongful benefit and advantage of the Joint Company." (See 2nd paragraph of prayer to Bill of Complaint. Rec-

ord 5) The Circuit Court of Appeals, in discussing this phase of the case, says: (Record 236)

> "But the Bill did not wholly rely upon Section 91" (R. S. 5242) "for a recovery. It also pleaded a charge of common law negligence. That this is a proper practice cannot be doubted. *Bowerman* v. *Hamner,* 250 U. S. 504."

The case of *Bowerman* v. *Hamner, supra,* is clearly distinguishable from the case at bar. In that case an action was brought by the Receiver of a National Bank against the executive officers and directors of the Bank, in equity, for an accounting and for a decree for such damages as the accounting disclosed the Plaintiff was entitled to. The Bill charged a breach of the statutory duty prescribed by R. S. 5200 and also a breach of a common law duty. The Bill was framed in the alternative, averring:

> (1) That the executive officers made, and that the Directors negligently permitted them to make, three designated loans, each in excess of one-tenth part of the paid-in and unimpaired capital stock and surplus of the Bank, in violation of Section 5200 of the Revised Statutes;
>
> (2) That beginning with 1910 the affairs of the Bank were grossly mismanaged by the executive officers with the negligent permission of the Directors; that of three designated loans, on which large losses were sustained, the one was made to a company without financial resources to justify such a loan, and without security, and with its capital stock owned principally by members of the family of the President of the Bank; that the two other designated loans were negligently made to persons without financial standing and without security sufficient to justify the making of them; that overdrafts aggregating large amounts were permitted to be made by many persons, *in violation of the By-laws* of the association, and that a dividend was declared and paid in July, 1910, when the capital stock and surplus of the Bank had been much impaired and its assets greatly depreciated. The gross mismanagement of the Bank, it is averred, caused the failure of the Bank and the loss for which recovery is prayed.

The action was not brought by the Receiver in the *Bowerman* case for the benefit of creditors of the Bank, but, as said by this Court, in its analysis of a similar Bill, in *Briggs* v. *Spaulding,* 141 U. S. 132, at Page 150—

> "The theory of this Bill is that the Defendants are liable, not to stockholders, nor to creditors, as such, but to the Bank, for losses alleged to have occurred during their period of office, because of their inattention."

The case at bar is not such a case as was considered by this Court in the *Bowerman* case. In that case the Court was considering a cause brought for the recovery of damages. (The equitable jurisdiction of the Court, as we understand it, was invoked because of the necessity of an accounting), caused by the unlawful and *negligent* acts of the managing officers and directors of a National Bank. All this Court held in the *Bowerman* case was that the common law liability of Directors for damages, flowing from their negligent acts, is not lessened by R. S. 5200, and that acts which were negligent at the common law could be jointed in such an action to recover damages, with acts which were unlawful because prohibited by the Statute.

In the case at bar, we have an entirely different situation. This was not an action for damages as against the Joint Company, but was an action to recover back a payment made by a Bank to a depositor, which payment was alleged to have been void because made under circumstances which Congress, by R. S. 5242, had declared *not an unlawful,* but a void payment. The suit in the *Bowerman* case, although in equity because of the necessity of an accounting, was, in fact, a tort action to recover damages from the managing officers and directors of the Bank arising out of their negligence. The officers and directors were the sole defendants. All were agents of the Bank.

Here, the suit as against the Joint Company is to re-

cover back from a depositor the amount of funds which had been paid to it under circumstances alleged to be such as would render the payment preferential and void. The action is analogous to a Bill to set aside a fraudulent conveyance and is properly in equity. Here, the depositor is joined with *one* director, as defendants, and if there be any liability on the part of the director charged, it is a liability separate and distinct from that of the depositor, and is enforcible at law only, and cannot be joined in an equitable action against the depositor.

In the *Bowerman* case, the acts which the directors and officers did, or omitted, were done or omitted by the defendants in their *official* capacity, and as agents of the Bank, and were negligent because the officers or directors violated a duty which they, as such officers and agents, owed at common law to their principal, and their omission to use care and their violation of a duty they owed to their corporation, resulted in damages to the corporation.

In the case at bar, the Joint Company was not an officer or director or agent of the Bank. It owed no duty to the Bank, either at common law or under the Statute. It had no relation to the Bank except that it was the Bank's creditor to the extent of its deposit, and no cause of action was alleged against it in which the Bank or the stockholders of the Bank were in any way interested, or concerned. On the other hand, Ekstrom, a co-defendant, was sued as a Director or agent of the Bank, but as a Director of the Bank it is not charged that he committed an act which was in violation of R. S. 5242, nor is it charged that, as such Director, he expressly breached or omitted to perform any duty which he, as a Director, owed to the Bank and which negligence caused the Bank damage. True, it is charged, he, as President of the Joint Company, signed the check of the Joint Company drawn on this Bank, but his act in so doing was not done *as a Director* of the Bank. It was done as an

agent of the Joint Company, to whom he owed the duty of affixing his name to a check, drawn on a deposit of his company, when his company desired to withdraw money from the Bank. As Director of the Bank, he owed no duty to the Bank to sign or refrain from signing a check for his employer, the Joint Company. He had nothing to do *as a Director of the Bank* in making payment of the check to the Joint Company. He did not act *for the Bank* in withdrawing the money. No duty he owed *to the Bank* was violated by him, either in signing the check or sending it to another bank for presentation for payment through the Clearing House. No cause of action for negligence *as a Director of the Bank* was charged in the Bill of Complaint, nor could such an action be predicated, against him, because of his signing the Joint Company's check and sending the same to an agent of the Joint Company for presentation to the Bank, because he owed no duty to the Bank in that connection. His entire *duty,* throughout the whole transaction, was to his employer, the Joint Company. As a Director of the Bank, he did no act in connection with the payment of the money. He did not act as a Director of the Bank, for the subject matter of the payment of the check was never considered at a Directors' meeting. Had there been a Directors' meeting held to consider the payment, or refusal to pay, this particular check, and he had knowingly refrained from attending the meeting, or had voted in favor of the payment of the check, and because of the action of the Directors, the paying officers of the Bank paid the check, then his action as a Director of the Bank might be open to challenge and there would be some logic in charging that he violated his duty to the Bank.

This Court has never held that it is permissible for a National Bank Receiver to complain of one Defendant who occupies the position of a depositor in a Bank, seeking to recover against the depositor under R. S. 5242, and in the

same suit to complain of one of the Bank's Directors for an alleged breach of confidential relation which, if a violation of any duty, would be a violation of a common law duty the Director *owed to the Bank.*

Let us examine the situation for a moment.

If the Joint Company, under circumstances enumerated in R. S. 5242, withdrew money from a Bank in which it had made a lawful deposit, and thereby effected a payment, by the Bank to it, which R. S. 5242 declares void, the action for relief would be analogous to a Bill to declare a fraudulent conveyance void and restore the property to the grantor. Under the Statute, a payment made under circumstances enumerated therein was declared void. As the payment had been made to a depositor (the Joint Company), the relief would be a decree that the depositor repay what it had unlawfully received, or, an action analogous to assumpsit—for money had and received, because the payment made to it was void. For a Receiver of a National Bank to join such an action with a *tort* action against a Director of a Bank would be an anomaly. It would be a combination of two actions— one in the nature of a bill in equity to set aside a preferential or fraudulent conveyance against a depositor arising out of a Statute—the other in the nature of *tort* for the alleged violation or neglect of a common law duty of a Director, which arose out of his relation to the Bank. The two actions have nothing in common and nothing in the *Bowerman* case sanctions the joining of two such actions.

In a suit by a National Bank Receiver to set aside a preferential payment made to one creditor who is not entitled to it, the action is brought *solely for the benefit of the creditors of the Bank.* The stockholders of the Bank or the Bank itself have no interest or concern in the transaction, for it makes no difference either to the stockholder or the

Bank itself whether one creditor receives the whole of his claim to the prejudice of other creditors, or not. If the payment is made to a bona fide creditor of the Bank, then so much of the assets of the Bank as were used to make the payment have satisfied a debt of the Bank, and that is all that the Bank or its stockholders are interested in. The creditors of the Bank, however, occupy a different position. If one creditor is preferred, every other creditor must take less in the pro rata distribution of the Bank's assets after liquidation, so that the only parties interested in this suit, brought by the Receiver, are the *creditors* of the Bank who did not participate in the preference. A recovery by the Receiver in a suit such as the one at bar will not change the financial status of the Bank. For while more funds will be available for pro rata distribution, the Joint Company which before was not a creditor of the Bank will, after it makes restitution, be a creditor to the exact extent of the recovery. Nor will a recovery add anything to the assets of the Bank which will be available to the stockholders. Consequently this suit on behalf of the Receiver is brought solely and only for the benefit of the creditors of the Bank. Ekstrom, as a Director of the Bank, owed absolutely no duty to the creditors of the Bank, unless it should be held by this Court that upon insolvency or approach to insolvency the assets of the Bank became a trust fund in the hands of its Directors for the benefit of the creditors. If there is any charge in the Bill of Complaint in this case stating a cause of action against Ekstrom, it is contained in the second paragraph of the prayer of the Bill (R. 5), which is as follows:

> "That upon a hearing of this Bill, it may be found and decreed by the Court that said Eric S. Ekstrom occupied a dual and confidential relation with relation to the said Manufacturers National Bank and the said Mechanics Universal Joint Company, a corporation, and that he used information which he gained in confi-

dence at a meeting of the Directors of said Bank, to the wrongful benefit and advantage of the said Mechanics Universal Joint Company, a corporation."

If Ekstrom owed any duty to keep in confidence his knowledge concerning the affairs of the Bank, he owed that duty not to the creditors of the Bank, but to the Bank itself or its stockholders. He owed that duty, if at all, by reason of the fact that he had been chosen as the Director or agent of the Bank. It did not affect the Bank or its stockholders in the slightest to divulge this information, if it was confidential, to a creditor, even though the creditor was thereby enabled to obtain a preference, because so much of the assets of the Bank, as were involved in the payment, were used to pay off and discharge a legitimate debt which the Bank owed to the depositor. On the other hand, the payment did affect creditors. But Ekstrom, the Director, did not owe any duty to the creditors which could be the foundation of a tort action. If, therefore, this action was brought by the Receiver for the sole benefit of the creditors not participating in the so-called preference, then the Receiver, acting for the creditors, could not complain of the violation of a duty which Ekstrom as Director owed, not to the parties who would be benefited by the judgment, but which he owed, if at all, to parties who were in no way injured or damnified by his divulging the so-called confidential information.

Had this been a suit such as was involved in the *Bowerman* case, in which the Receiver was suing for the *benefit of the Bank,* to have restored *to the Bank* assets which had been dissipated by the negligence of the Directors, then a different situation would arise. Then there we would have a breach of a duty which the Director owed to the persons for whose benefit the Receiver *was bringing the action.* We have no such situation in the case at bar. The sole object of the Bill in the case at bar is to set aside and declare void

an alleged preferential payment and to restore that payment to the assets in the hands of the Receiver so that other creditors of the Bank would profit. In a suit such as was before this Court in the *Bowerman* case, the action was brought for the benefit of the *Bank* itself *and its stockholders* to recover for a breach of a duty which the Officers and Directors of the Bank, as agents thereof, owed *to the Bank* itself *and its stockholders* by reason of their agency, and which breach of duty *caused damage to the Bank,* the one to whom the duty was owing. That case is so dissimilar to the case at bar that the holding by this Court in the *Bowerman* case that a common law breach of duty could be joined with a statutory breach of duty, because in that case both duties were owed by the Defendant to the Plaintiff, is no authority in this case.

Just what then, is the status of a Receiver of a National Bank, and what right has he to the property and choses in action of the Bank, and who does he represent when he brings a suit to disaffirm a prior preference?

A Receiver of a National Bank, appointed by the Comptroller, is a mere Trustee for the creditors (*Scott* v. *Armstrong,* 146 U. S. 499, 36 L. Ed. 1059). He takes no greater right in the property than the insolvent Bank itself possessed, except that as representative of the creditors he is clothed with the right to disaffirm transactions of the Bank in violation of law and in fraud of the rights of creditors (53 C. J. 325, and cases there cited)—*a right which the Bank could not itself exercise* (*Dent* v. *Ferguson,* 132 U. S. 50, 33 L. Ed. 242; *Randolph* v. *Howard,* 67 U. S. 585, 17 L. Ed. 269; *Wheeler* v. *Sage,* 68 U. S. 1 Wall. 518 (530), 17 L. Ed. 646). If the *Bank* sought to exercise such a right, the maxim *in pari delicto portior est conditio defendentis* would bar relief and would close the Courts to it, for it is against the policy of the law to relieve either party, as

against the other, from the consequences of their own misconduct. It follows then, that, as the Receiver in this suit brought this action as a representative of the creditors, and for their sole benefit, his action, so far as it is founded, not on the Statute, but as an equitable action to disaffirm and set aside an alleged unlawful preference in aid of creditors, when he bottoms his action upon alleged tortuous acts of Ekstrom, as Director of the Bank, he must aver

(1) the existence of a duty on the part of Ekstrom to protect the *creditors* from wrong;

(2) failure of Ekstrom to perform that duty; and

(3) injury to the creditors *from such failure of Ekstrom.*

In the Bill of Complaint, Respondent charged, after alleging that a meeting of the Directors was held on June 12 at which Ekstrom received information that the Bank was about to collapse, then alleges, that Ekstrom left said meeting, and immediately thereafter, having such knowledge and information, and because of such information, caused the check in question to be executed and caused the withdrawal to be made (See Paragraph 3 of Bill of Complaint, R. 3, 4, 5). If any cause of action is stated in said Bill of Complaint which is founded upon any common-law liability, separate and apart from the statutory liability provided by R. S. 5242, it arises because of the above allegations of fact, and the conclusion of law asserted by the pleader in the first four lines of Paragraph 4 of the Bill of Complaint (R. 5) and in the second prayer of the Bill (R. 5). The conclusion of law as set forth in Paragraph 4 of the Bill is:

> "That said action of said Eric S. Ekstrom, as aforesaid, in addition to the fact that it was done under information which he had acquired in a confidential relation with said Manufacturers Bank", etc., "was done contrary to the provisions of R. S. 5242."

The second prayer to the Bill has been heretofore quoted.

It is quite apparent that the theory of Respondent as revealed by his pleadings, as to the so-called common-law right of the Plaintiff to disaffirm and set aside this alleged unlawful preference, was the asserted *negligence* of Ekstrom in *using* information which he gained in confidence at a Directors' meeting, *to the wrongful benefit and advantage of the Joint Company.*

That this, and not that the payment was inhibited by R. S. 5242, was the basis of the decree of the District Court, is conclusively indicated by Conclusion of Law No. 4 found by that Court herein. The Court found (R. 193):

> "In view of the knowledge possessed by Ekstrom which he had acquired because of his confidential connection with the * * * Bank, when he drew the check of the Defendant Corporation for $42,761.12, it would be inequitable to allow the Defendant Corporation to obtain the advantage which it would thereby obtain over other depositors by virtue of the knowledge which its President had acquired, as aforesaid."

That this was the real theory of the Circuit Court of Appeals, which induced it to affirm the decree of the District Court, is found in that language of Judge Sparks, heretofore quoted, as follows:

> "But the Bill did not wholly rely upon Section 91" (R. S. 5242) "for a recovery. It also pleaded a charge of common law negligence." (R. 236.)

Now, it is our contention that Respondent, by his pleadings, the District Court by its findings and the Court of Appeals by its affirmance of the decree, on this branch of the case, were in most grievous error.

No cause of action, aside from the alleged statutory cause based upon the asserted fact that the transfer was effected in violation of R. S. 5242, was stated in the Bill, or proved by the evidence. The whole theory of the Respondent and the Courts below that such a cause of action could be founded upon the tortuous or negligent act of Ekstrom *in*

using confidential information he obtained as a Director of the Bank, was an erroneous theory because it is founded upon a premise that has no foundation in the law.

If, Ekstrom, as a Director of the Bank, owed any duty, to keep in confidence facts which he learned at a Directors' meeting, *he owed that duty* to the Bank, not to the creditors. The creditors had no right to, no lien upon and no interest in the assets of the Bank at the time the payment was made. Ekstrom was not a trustee for, or representative of, the creditors when he was acting as a Director of the Bank, irrespective of whether the Bank was solvent or insolvent. Not representing the creditors, he owed no duty *to the creditors* to keep confidential the information he received at a Directors' meeting.

If we assume that Ekstrom received the information in confidence, and if we further assume that he abused this confidence to the advantage of the Joint Company, whose confidence did he abuse? Manifestly, if he owed a legal duty to keep in confidence that which he had learned, *he owed that duty* to his principal, the Bank, and to no one else. He did not owe that duty to the creditors, unless it can be said he was a trustee for or representative of the creditors and that the assets of the Bank were a trust fund in the hands of the Directors for ratable distribution among the creditors (a theory which this Court has heretofore frequently considered and conclusively condemned). If then, Ekstrom owed this duty to the Bank, and the Bank alone, then we fail to see how the Receiver, in a proceeding brought *solely* for the benefit of the creditors, is in a position to criticize Ekstrom for the alleged wrongful violation of a duty owed to someone other than the creditors, much less to predicate a cause of action for the benefit of the creditors founded upon a breach of a duty Ekstrom owed, if at all, *to someone other than the creditors.*

If the information was received by Ekstrom in confidence, and if to *use such information* to the advantage of a depositor was a breach of duty Ekstrom owed to his principal, the Bank, it was not only a breach of duty of which the creditors had no right to complain, but its result was in no way injurious to the Bank, for the result was not a dissipation of assets of the Bank or use of its assets for purposes foreign to the purposes for which it was organized. The result was that the assets of the Bank to the extent of the withdrawal, was used to pay a legitimate debt which the Bank owed to a depositor. The Joint Company, the depositor who received the payment, had the legal right, and an equal right, to make a demand for payment of its deposit so long as the Bank was open and functioning, that any other depositor had, and the Bank was in no way damaged. It cannot be said that the financial position of the Bank was changed by the transaction, because by making the payment it wiped out so much of its debt as was represented by the payment.

If, therefore, the creditors were damaged because Ekstrom violated a confidence it was his duty to keep, they, *nor the Receiver in their behalf*, could base a cause of action thereon, because the duty which Ekstrom violated, if any, was not a duty imposed upon Ekstrom for the benefit of the creditors. He owed them no duty in that respect and they cannot complain because he violated a duty he owed to someone else. In the law of negligence, this is elementary.

Chesapeake & O. R. Co. v. *Mihas*, 280 U. S. 102 (106).

Northern P. R. Co. v. *Adams*, 192 U. S. 440 (450).

National Sav. Bank v. *Ward*, 100 U. S. 10 Otto 195.

If the Courts below were in error in decreeing judgment against the Defendants based upon a cause of action

founded on R. S. 5242, as we hope we have demonstrated heretofore, and if the cause of action attempted to be set up founded upon common law negligence, and irrespective of the Statute, has no existence, for the reasons argued, then it seems hardly necessary to argue that Respondent's cause of action does not exist.

(D)

DID THE COURT ERR IN ADMITTING AND CONSIDERING EXHIBITS 22, 24, 25 (R. 242-254)?

Exhibit 22 is in two parts:

(a) A letter from the Comptroller to the Directors of the Manufacturers Bank dated January 8, 1931;

(b) The Examiner's report of the condition of the Manufacturers Bank as of December 4, 1930.

Exhibit 24 is a letter from the Comptroller to the Directors of the Manufacturers Bank dated May 28, 1931.

Exhibit 25 is the Examiner's report of the condition of the Manufacturers Bank as of May 1, 1931.

It will be noted that none of these Exhibits are authenticated as required by R. S. 884. These Exhibits were objected to when offered (R. 31-32). By assignment of error No. 6 (R. 198) petitioners, in the Circuit Court of Appeals, specifically assigned error as to the admission of the exhibits above enumerated. We would not take the time of this Court in argument as to the claimed erroneous ruling in the Court below in the admission of these exhibits, in a chancery case, were it not for the fact that findings of fact numbers 13, 14 and 15 (R. 189-190) and the conclusion of the Circuit Court of Appeals were based solely upon said exhibits. (R. 236.) It is apparent that the Courts below did consider that evidence as not only material, but controlling in this case, and it is on the basis of those findings

based solely upon these exhibits that the Court below entered the decree in this case and the Circuit Court of Appeals sustained that decree.

The Examiner's reports of the condition of the Manufacturers Bank contained many statements as to the *opinion* of the Examiner as to the value of certain assets of the Bank, *i. e.*, in the recapitulation, certain assets are classified as "slow", "doubtful", "loss probable but not estimated", and "estimated losses" (R. 247 and 253). Under each of these headings appears certain figures of large amounts indicating that, *in the opinion of the Examiner*, $1,036,102.10 of the assets of the Bank on December 4, 1930 were "slow" (R. 243), and on May 1, 1931, that $1,145,201.15 of said assets were "slow". (R. 253.) Under the heading "doubtful loss probable but not estimated" in the report of December 4, appears the figures $462,105.64 (R. 247), and in the report of May 1, 1931, under the same heading, appears $430,821.34 (R. 253). Under the heading "estimated losses" in the December 4 report are the figures $162,877.12 (R. 247), and under the same heading in the May 1 report appears the figure $19,795.80 (R. 253). Neither of these recapitulations state *any facts* upon which the conclusion or the opinion of the Examiner as to the classification of these assets is based. There was no explanation as to what the Examiner intended to convey by the use of the classification "slow". Whether he meant to convey the idea that, in his opinion, such assets *would not be collected* at their respective due dates, whether he meant that the assets so classified were *past due*, whether he intended to mean the assets had been renewed an unreasonable number of times, or whether he simply meant that the assets were *non-liquid* in his opinion, there is no means of telling. If the words used in the classification of the assets had a certain meaning in the science of accounting, or, if the words, by reason of certain regulations

of the Comptroller, had a certain meaning, there is no proof in this Record as to the scientific meaning of these words, or the meaning prescribed in the regulations.

What *facts* formed the basis of the Examiner's opinion that certain assets were "slow", others "doubtful" and for his estimation of "losses", is not revealed by the reports themselves or by extraneous testimony. The recapitulation is simply the conclusion of the Examiner. The heading of the reports, respectively (R. 244 and R. 258), shows that the report is mere secondary evidence of the facts or opinions stated therein for the reports state:

> "The information contained therein is based upon the records and books of the Bank and upon statements made to the Examiner by Officers and employees of the Bank, and on data secured from other sources believed to be reliable, and presumed by the Examiner to be correct." (R. 244 and R. 250.)

There is nothing in the reports, however, to indicate what, that is contained in the reports, was obtained from the books of the Bank, what was obtained from statements obtained from officers and employees, nor what from other sources which the Examiner presumed was true. No proof of any kind extraneous to the reports was offered in explanation thereof.

So that there is no means of determining on what information the Examiner based his conclusions, and for all that is known, the opinions and conclusions of the Examiner as to certain assets being "slow", others "doubtful" and others "losses" may have been based on information not disclosed by the books and records of the Bank, not obtained from statements of officers or employees of the Bank, but may have been based entirely upon "other sources of information", the kind or character of which is not disclosed.

The reports, therefore, were not admissible because

(1) It is apparent on the face of each report that the relevant information therein was simply the opinion and conclusion of the Examiner, and

(2) Those opinions and conclusions were based upon hearsay evidence.

When we come to the letters from the Comptroller to the Directors of the Bank, we find that therein the Comptroller is simply calling to the attention of the Directors *the opinions and conclusions* of the Examiner, and the Comptroller criticizes certain assets, the criticisms being based upon the *conclusions* of the Examiner, and directs the Board to expeditiously collect, reduce and adjust the criticized assets, or to obtain additional security therefor, and to report progress every thirty days, etc.

Now, upon what principle of the law of evidence were these reports and letters admissible in this case? As probative of the facts found by the District Court in findings No. 13, 14 and 15 (R. 189-190-191) the exhibits were not admissible, for they were not only opinions and conclusions, but hearsay, and secondary evidence of the most flagrant character. Yet, it is on the strength of these exhibits, alone, that the Courts below found that the Directors of the Bank "should have known that the Bank was insolvent and that closing was imminent".

Respondent argues that these exhibits were admissible as *notice* to the Directors as a class, and to Director Ekstrom in particular.

Notice of what?

The exhibits did not prove or purport to prove insolvency of the Bank at the time of, or prior to, the payment, in the sense that the value of the assets was less than the liabilities. Manifestly, the fact that an Examiner may believe that certain assets are "slow" or "doubtful" does

not prove these assets uncollectible in a Court of law, nor does the opinion of the Examiner that certain Directors' loans were among the "weakest in the Bank", prove that, to the extent of these loans, the assets are uncollectible.

Then, what did the exhibits amount to as *notice* to the Directors or Ekstrom? It was of no materiality in the case, that we can conceive, that the Comptroller criticized some of the Bank's assets and demanded that the same be collected or further secured. Yet, that is all the *notice* that these exhibits gave to the Directors.

The relevant question in the case was:

Was the Bank insolvent or so close to insolvency that the Directors "contemplated" an act of insolvency at the time the payment was made?

These exhibits do not prove or tend to prove that fact. All that is stated in them that is of even casual interest is that *in the opinion of* the Examiner, re-stated by the Comptroller in his letters, enough of the assets to offset "capital and undivided profits" were either "slow" or "doubtful" or were the "weakest in the Bank".

The Comptroller of the Currency is a high government official. He has been given large powers and is vested with great discretion. His discretion, when it comes to the determination of the insolvency of a Bank, is practically unlimited, and, if and when he, in the exercise of his discretion, certifies to the insolvency of the Bank, that certificate is final, and, in the absence of fraud, conclusive upon the world, including the Courts, and his certificate of insolvency or a certified copy thereof, duly authenticated, would be admissible and conclusive proof of that fact in any Court; but his *opinion* as to the value of certain assets, made in a letter, not sworn to, based entirely upon hearsay testimony, is not only inadmissible in a Court of law, but not probative of any fact therein recited.

An examination of the exhibits aforesaid will disclose that, in none of them, does the Comptroller express an opinion that the Bank was insolvent, and manifestly the Comptroller was of the opinion that the Bank was in a condition to safely keep open and continue business, otherwise he would have closed the same and certified to the insolvency of the Bank at the date of his letter. He did not do this. In none of the exhibits aforesaid does the Comptroller express any opinion with reference to the condition or value of the Bank's assets. He simply calls the attention of the Directors to the opinion that had been expressed by the Examiner that some of the assets were "slow", some "doubtful", some "losses" and some were the "weakest in the Bank". An opinion of a National Bank Examiner as to the classification of assets is not proof that the Examiner's opinion is correct, or is a fact, unless and until the Comptroller, acting upon that information, issues his certificate declaring the Bank insolvent. Then, of course, that certificate of the Comptroller is binding upon the Courts, to the extent that the Receiver's appointment or the cause of his appointment cannot be questioned by a depositor of a Bank.

Cadle, Receiver v. *Baker, et al.*, 20 Wall. 650, 651.

But prior to the issuance of such certificate, an opinion by the Comptroller or an opinion by a National Bank Examiner as to the value of assets or the correct classification thereof, expressed casually in a letter, are mere opinion and conclusion and are not relevant proof of the value or lack of value of said assets. This is a question that so far as we can learn has never been decided by any Federal Court. Under the Statute, as we understand it, a National Bank Examiner has limited visitorial powers of a National Bank. By Section 481 of the Banking Act, a National Bank Examiner has the power to examine a National Bank at

least twice in each calendar year and oftener if considered necessary; and it shall be his duty to make a full and detailed report of the condition of said Bank to the Comptroller of the Currency (R. S. 5240). These reports are only for the Comptroller and for the Bank, and are not public documents, open to the inspection of the public, nor do they have any probative value except as they may convey information to the Comptroller upon which the Comptroller is authorized to control the affairs of the Bank. They are not public documents but confidential documents for the information of the Comptroller only. Any opinions expressed by the Examiner as to the value of assets are merely his personal opinion and are not proof that his opinion is founded upon facts, or is correct. The opinions of the Bank Examiner may be adopted by the Comptroller, and, acting thereon, he may issue his certificate declaring the Bank insolvent, and thereupon he may appoint a Receiver, or he may not, depending upon the Comptroller's discretion in the matter. There is no judicial holding, nor is there any Statute, that the reports of a National Bank Examiner to the Comptroller concerning *his opinions* as to the affairs of the Bank, or the value of its assets, are admissible in evidence or probative that his opinion and conclusion is a fact in a Court of law. The assets of a Bank, to a very large extent, consist of choses in action. All of the assets criticized by the Comptroller were choses in action. The ordinary rule is that the value of assets such as choses in action cannot be proven in a Court of law by an opinion or conclusion of witnesses.

Interstate, etc. Corp. v. *Jewelry Co.* 280 Ill. 116 (122).

People v. *Gould,* 345 Ill. 288 (328-9).

People v. *Clark,* 329 Ill. 104 (110, 111).

Anderson v. *First National Bank,* 6 N. D. 497; 72 N. W. 916.

Atkinson v. *Rochester Printing Co.*, 43 Hun. 167.
Booth v. *Powers*, 56 N. Y. 22.
Ingals v. *Lord*, 1 Cow. 240.
McPeters v. *Phillips*, 46 Ala. 496.
Latham v. *Brown*, 16 Iowa 118.
2 Parsons on Contracts, 471.

If this be true, then the opinion and conclusion of the Examiner is no different from the opinion and conclusion of any other witness. Issues of fact are triable in a Court of law by sworn testimony, not by *ex parte* reports containing mere matters of opinion, unsworn to by a National Bank Examiner and unauthenticated and gleaned from unknown sources of information. We therefore contend that the opinions as to the classification and value of assets expressed in Plaintiff's Exhibits 22, 24 and 25 were inadmissible in evidence for the purposes for which they were used in this case, and for the purposes upon which the District Court based its findings Nos. 13, 14 and 15, and upon which the Circuit Court of Appeals affirmed that judgment.

(E)

DID THE COURT ERR IN DISMISSING THE COUNTERCLAIM?

It will be noted that the defendant Joint Company, by its answer to the complaint, in addition to denying the facts alleged in the complaint, set up as an affirmative defense that the Manufacturers Bank during the period when it received the deposits of the Joint Company of upwards of $150,000, in May and June, 1931, was as hopelessly insolvent to the knowledge of its officers, as it was on June 13, when the payment in question was made, and that it kept said bank open during said period, and by so keeping said bank open, it impliedly represented to the public and to the Joint Company that it was solvent, and that the receipt of said deposits under such circumstances, when it

was hopelessly insolvent to the knowledge of its officers constituted such fraud upon the Joint Company that the title to said deposit never passed to said bank nor, through it, to the receiver; but that the title to the same in equity remained in the Joint Company, and that said title so remained when the bank was taken over by the receiver; that the deposits of the Joint Company which came into his hands were not assets to be distributed to the general creditors of said bank but constituted a trust fund, therefore that said withdrawal of said check, Plaintiff's Exhibit 14, was not a withdrawal of funds rightly distributable by the receiver to the creditors under the National Banking Laws, but it equitably belonged to the Joint Company.

The counterclaim filed by the defendant Joint Company sought to recover from the receiver, on the same basis, the balance of the fund which was in the hands of the receiver as the result of the deposits fraudulently obtained from the Joint Company by impliedly representing, by keeping its bank open for deposits and withdrawals, that it was solvent, when in fact it was not. We concede, in presenting our views on this question, that both this affirmative defense and the counterclaim are inconsistent with the contention, we have heretofore made, that there is no proof in this case that said bank was hopelessly insolvent during the period when the deposits of the Joint Company were made. But the court below found, in effect, that the bank was hopelessly insolvent during the period when the deposits were made, and that its insolvency was known, or should have been known, to its officers at the time it received the deposits; but found that because Ekstrom was President of the Joint Company and at the same time was a director of the bank, his knowledge of the condition of the bank was attributable to the Joint Company, and that therefore the Joint Company was not an innocent depositor and was not misled by the implied representation, by keeping

the bank open, that the bank was solvent at the time it made its deposit.

We deny, as a legal proposition under the facts in this record, that the knowledge Ekstrom had as a director of the bank was attributable to the Joint Company because Ekstrom was its president, in the absence of proof that Ekstrom conveyed to the Joint Company the knowledge which he as a director of the bank acquired. There is no such proof in this record. In fact the exact opposite was proved.

If we have succeeded in convincing this Court, by the argument heretofore made, that the Manufacturers Bank at the time the deposits were made and up to the time it closed its doors on June 13, 1931, was solvent, then we frankly confess that the decree of the Court below dismissing the counterclaim was justified. If, however, this Court should find that, from Exhibits 22, 24 and 25, the Court below was justified in finding that said bank was hopelessly insolvent during the whole period from December, 1930, until the bank closed on June 13, 1931, then we say that the answer set up a full and complete defense not only to the payment of the check in question, Plaintiff's Exhibit 14, but that also the Joint Company was entitled to recover on its amended counterclaim the balance of the deposits in said bank, unless it be true as a legal proposition that the knowledge of Ekstrom as a Director of the Bank was chargeable to the Joint Company because Ekstrom was also President of the Joint Company. We therefore argue these two questions, namely, the affirmative defense made by the Joint Company and its amended counterclaim under one heading.

If the Bank was hopelessly insolvent when the Joint Company deposited, during the months of May and June, the sum of more than $150,000 with the Bank, and if as is found by the Court in Findings of Fact Nos. 13, 14 and 15,

such insolvency was known, or should have been known, to the Officers of the Bank during that period, then the act of the Bank in receiving deposits from the Joint Company to the extent of $150,000 was a fraud upon the Joint Company, if it knew nothing about the insolvency of the Bank. In this case there was proof that cash and the equivalent of cash to the amount of approximately $500,000 came into the hands of the Receiver upon the closing of the Manufacturers Bank. This cash was augmented by the amount of the deposits made by the Joint Company. It is a well established principle of law that, when a Bank has become hopelessly insolvent, and its Officers know it to be so, it is a fraud to receive deposits of checks from an innocent depositor ignorant of its condition, and he can reclaim them or their proceeds.

St. Louis Ry. Co. v. *Johnson,* 133 U. S. 566; 33 L. Ed. 683.

Quinn v. *Earle,* 95 Fed. 728.

Richardson v. *New Orleans Coffee Co.* 102 Fed. 785.

Brennan v. *Tillinghast,* 201 Fed. 609.

Fidelity and Deposit Co. v. *Kelso,* 287 Fed. 828.

Federal Reserve Bank v. *Idaho Association,* 8 Fed. (2nd) 922.

Marvin v. *Martin,* 20 Fed. (2nd) 746.

By Finding of Law No. 10, the Court below found as follows:

> "The Mechanics Universal Joint Company, through its President, Erick S. Ekstrom, who was also a Director of the Manufacturers National Bank, knew at the time the several deposits were made by it in the Manufacturers Bank, that the Manufacturers Bank was in a precarious and embarrassing financial condition and hence the depositor was not an innocent depositor and no fraud was practiced upon such depositor. The counterclaim cannot be sustained."

It will thus be seen that the Court based this defense to the counterclaim solely upon the ground that the knowledge of Ekstrom was the knowledge of the Mechanics Universal Joint Company; or, to state it another way, that the Mechanics Universal Joint Company was charged with all the knowledge that Ekstrom, its President, had as to the condition of the Manufacturers Bank. This is not the law, as we understand it. Ekstrom's connection with the Manufacturers Bank as a Director thereof was his own private business and it had no connection of any kind or nature with his employment by the Joint Company as its President. The undisputed proof in this case is that Ekstrom had nothing to do, as President of the Joint Company with the deposit of its money in Banks, or with the selection of Banks in which its money would be deposited. There is no proof of any kind or nature in this case that Ekstrom had anything to do with the fiscal affairs of the Joint Company. There is no presumption that the President of a corporation has anything to do with the depositing of the moneys of the corporation. In this case it appears that the Joint Company had a treasurer, Gustafson, and if there is any presumption to be indulged in at all, the presumption would be that it was the treasurer's business to control the deposit of the corporation's funds. Ekstrom, in his capacity as Director of the Manufacturers Bank, was dealing in his own private capacity and in his own behalf and in no sense was he acting within the scope of his employment by the Joint Company in so doing. A corporation is not charged with notice of facts which became known to its President while he was dealing in his private capacity and in his own behalf with third persons.

3 Fletcher on Corporations, Sec. 812.

Where the same person happens to be the agent of two principals, notice to him will not necessarily be notice to both principals. To make it so there must be some duty

imposed upon him to communicate it to the principal sought to be effected.

Meechem Agency, 2nd edition, Secs. 1837, 1838.
Little Red River Levee Dist. v. *Garret,* 154 Ark. 76.

Where a corporation deals with another corporation, of which its Officer is also an Officer or agent, or with a natural person, of whom he is also an agent, it is not chargeable with knowledge of facts possessed by him, if it does not relate to matters within his authority as Officer of the first named corporation or if he is not acting as its agent in the matter.

3 Fletcher on Corporations, Sec. 824, and authorities there cited.

This precise question has been decided by the Circuit Court of Appeals of the Fifth Circuit in the case of *Ohio Miller Mutual Ins. Co.* v. *Artesia State Bank,* 39 Fed. (2) 400.

In announcing the rule of law applicable to this case, the Court said (page 402):

> "If notice is charged to the Plaintiff, it must be through the undoubted knowledge that its President, Aderly, had of any such fraud at the time he participated in the purchase of the certificate of deposit by the Plaintiff from his company, at least to the extent of approving it. Knowledge of an agent is ordinarily notice to his principal. The exceptions to this general rule are two-fold. When the interest of the agent is adverse to that of his principal in such a way as that the agent will be presumed to conceal his knowledge from his principal and not to disclose it to him, the rule does not apply. Also, when the knowledge of the agent is not acquired while acting in the course of his employment for his principal, it does not bind the principal. The principal is not chargeable with notice of facts within the knowledge of his agent, when the latter acquired such knowledge while acting as agent for another. The two exceptions are so well settled as not to require citation of authority."

The proof in this Record shows that the entire capital stock of the Mechanics Universal Joint Company was owned by Borg-Warner Corporation, and that Ekstrom, in the Joint Company, held only a qualifying share. (Trans. 105.) The proof further shows that he owned 500 shares of the capital stock of the Borg-Warner Corporation having a par value of $10 each (Trans. 116) and that he held no stock in any affiliated company of Borg-Warner. His only interest in the Joint Company, therefore, outside of this very insignificant holding of stock in the Borg-Warner Corporation was as a salaried employee, namely, its President.

The findings of the Court below on this question were very inconsistent. The bill of complaint which was being tried in the Court below charged that the information which Ekstrom received at the directors' meeting on June 12 was *confidential* information and such as that it would be a breach of confidence for Ekstrom as President of the Joint Company to reveal to his company; and the bill charges that in violation of this confidence he did reveal the information to his company and the Court, by conclusions of law Nos. 5 and 6, found in effect that he did violate this confidence. Yet the Court holds by conclusion of law No. 10 that Ekstrom because he was a Director of the Bank and also President of the Joint Company should have divulged the confidential information which Ekstrom received as Director of the Bank that the Bank was in financial distress during the time that the Joint Company deposited $150,000 in the Bank. That is, in passing upon and construing the Plaintiff's bill of complaint, in order to render a decree in favor of the Plaintiff, the Court finds that because Ekstrom *violated* a confidence, by revealing confidential information which came to him as a Director of the Bank, the Defendant Joint Company must sufier; and yet when the Defendant Joint Company asserts a right

against the Receiver of the Bank, the Court holds that a Court of equity will *presume* that Ekstrom revealed the confidential information that the Bank was insolvent when the Company of which he was President made deposits therein. If Ekstrom as a Director of the Bank, received confidential information at the Directors' meeting of June 12 that the insolvency of the Bank was imminent, then, manifestly, the information which he had received from the Comptroller's letter to the Officers of the Bank accompanying the December, 1930, report of the Examiner and the May, 1931, report of the Examiner, was equally confidential. Without a scintilla of evidence that Ekstrom violated his confidence on either occasion, the Court below *assumed* that he did violate the confidence imparted to him at the Directors' meeting of June 12, and that he thereby committed such a wrong that the Receiver of the Bank could recover against him as well as the Joint Company, and that he *should have violated* the confidence which he received in December and May from the Comptroller, which undoubtedly would have caused the Joint Company not to make the deposits of $150,000 in the Bank.

In the case at bar the complaint is predicated upon the presumption that Ekstrom, the President of the Joint Company, in acting as a Director of the Bank on June 12, 1931, received confidential information as to the Bank's impending collapse, which confidence in equity and good conscience he should have kept sealed in his own breast, and if he divulged it to the corporation of which he was President, he committed an equitable wrong upon the Bank, and because, the complaint charges, in violation of his duty not to divulge the information to the Joint Company, the Joint Company took advantage of this information and withdrew a substantial amount of its deposit in the Bank, with knowledge of the Bank's approaching insolvency, Section R. S. 5242 is applicable and the withdrawal is thereby avoided.

If the notice Ekstrom received at the Directors' meeting of June 12 was confidential because Ekstrom received it as a Director of the Bank, and if the information was so confidential that for Ekstrom to reveal it would have been a violation of his duty to the Bank, as the complaint charges, then the presumption, in the absence of proof to the contrary, would be that he did not reveal it to the Joint Company. He testified he did not reveal this information to the Joint Company or anyone connected therewith; that he gave no directions to anyone connected with the Joint Company relative to a withdrawal of funds in the Bank. The agent of the Joint Company who directed the preparation of the check and the withdrawal of the money (Stark) testified that he had no knowledge of the condition of the Bank and received no directions from anyone to make the withdrawal and the transfer, but that he did it for the purpose of equalizing the deposits of the company in the various Banks of the City where the Company maintained deposits.

In the face of this uncontradicted evidence, and in the face of the presumption that Ekstrom kept confidential that information which he acquired as Director of the Bank which it was his duty to keep in confidence, and without the slightest evidence that Ekstrom violated the confidence, and with no finding of fact that actual notice was given by Ekstrom to the Joint Company, the Court below found as Conclusion of Law No. 4 that "it would be inequitable to allow the defendant corporation to obtain the advantage which it would thereby obtain over the other depositors by virtue of the knowledge which its President had acquired as aforesaid." We respectfully submit this is equivalent to the Court holding that Ekstrom's knowledge, received when he was acting as a Director of the Bank, was chargeable to the Joint Company, because Ekstrom was its President; that although Ekstrom was bound by ethics, morals, fair dealing or equity not to divulge the confidential informa-

tion he so acquired, and with no proof that he did so, yet it would be inequitable not to indulge in the presumption that he did so, and this because, as the Court below argues, the Joint Company obtained an advantage over other depositors by virtue of the knowledge which its President had acquired when acting, not as its President, but in performance of his own private business as Director of the Bank. We respectfully submit that Courts of respectable authority in this country and England have determined to the contrary.

In 14a C. J., page 491, Sec. 2359, this subject is discussed. It is there said:

> "Where there are dealings between two corporations or between a corporation and an individual through the intervention of a common officer or agent, the question whether the corporation is to be charged with notice of what is known to the agent by virtue of his relation to the other corporation, or to the other party, depends upon the circumstances of each case; if under the circumstances it is his duty to communicate such knowledge, the corporation to which he owes such duty will be chargeable with his knowledge; but, of course, this does not apply to knowledge which he is under no duty to disclose, or which is in the nature of a confidential communication which he is not at liberty to disclose to the corporation."

See also:

Interstate Finance Company v. *Hosch*, 163 S. W. 600.

In Re Marseilles Extension Ry. Co. 6 L. R. 7 Ch. 161.

It is our contention that if the Court in this case was correct in dismissing the counterclaim, the Court was in error in entering the decree on the bill of complaint, and conversely if the Court was justified in entering the decree on the bill of complaint on the ground that the Manufacturers Bank was hopelessly insolvent and known to be such

by its Officers when the withdrawal took place, that on the same proof a decree should have been rendered in favor of the Defendant Joint Company because the Bank was equally hopelessly insolvent when the Joint Company made the deposit of the money which it withdrew by the check in question.

(F)

THE COURT BELOW ERRED IN RENDERING A MONEY JUDGMENT AGAINST EKSTROM.

Regardless of the correctness of the decree against the Joint Company, there was no justification under any law that we are aware of to hold Ekstrom for the amount of the withdrawal on June 13, 1931. This case has its foundation in Section 91 of the National Banking Act. All that section does is to declare void any payment made by the bank under the circumstances described in the section. Ekstrom received none of the money that was realized on payment of this check. It all went to the Joint Company who owned it. If the payment by the bank of this check was void the Joint Company could be held liable because the Joint Company received the payment. There is neither authority in law nor in the statute for holding Ekstrom liable. Consequently the decree as to Ekstrom must be reversed, regardless of the question as to whether or not the Joint Company can be held liable.

The District Court, in the case at bar, decreed that Ekstrom was liable because he took advantage of confidential information he received at a Directors' meeting of the Bank and that he *negligently* used this information to secure for the Joint Company an unlawful preference (Conclusion of Law No. 5, R. 193), and consequently that Ekstrom became liable (Conclusion of Law No. 9, R. 194). Error was assigned upon these conclusions and it was argued to the Cir-

cuit Court of Appeals that there was no justification for a decree against Ekstrom, but the Circuit Court of Appeals did not notice the assignment nor, in its opinion, comment on the same, and it is impossible to determine its reason for holding Ekstrom liable except it is apparent that Court adopted the conclusions of the District Court.

It seems to us that upon the application of the most elementary principles of the law of negligence, that the decree against Ekstrom was erroneous. What duty did he omit to perform which he owed to the creditors of the Bank? What duty did he owe to the creditors?

There can be no question but that, regardless of the question as to whether a National Bank Receiver is the representative of any one but the creditors, and even admitting there may be cases when he is authorized to bring action as the representative of the Bank or its shareholders, yet *this suit* was brought by him as a representative of the creditors alone, the bank had no interest in it and did not profit by the decree, for, if the Receiver collects the amount decreed in this case it will add nothing to the assets of the bank to be distributed to its shareholders, for there is no question but that the Joint Company was a depositor in a commercial account in the bank to the extent of $65,224.30 at the date the check in question was drawn. If the Joint Company was entitled to withdraw the check in question, *i. e.*, if the withdrawal was valid, then, in the distribution of the bank's assets by the Receiver it would be entitled to its pro rata share of $22,463.18, the balance remaining of its deposit after the check of $42,761.12 had been paid. If, however, the withdrawal of $42,761.12 is void, then the Joint Company is a creditor of the bank to the extent of $65,-224.30 and entitled to its pro rata share based on that amount. So that when and if repayment of $42,761.12 is made, while on one side of the distribution sheet there will

be the amount of the check available for pro rata distribution to creditors, on the other side the total amount owing to creditors will be increased to the exact amount. The only effect of the collection of this decree will be that creditors other than the Joint Company will receive a slightly larger pro rata dividend while the Joint Company will receive less than $42,761.12.

It being perfectly manifest that the creditors are the only ones who will benefit in the slightest by this suit, if the Receiver is successful in obtaining a decree, it follows that, in this suit the Receiver stands as the representative of the creditors and no one else.

Not only that, but this is the kind of a suit that the Receiver, as representative of the Bank or its shareholders, could not bring, for it is a suit to set aside an alleged fraudulent preference. Neither a Court of law nor a Court of equity will lend its aid to one who has granted a fraudulent preference to recover back from the recipient of it the amount of the preference. The rule is that the Courts will *not aid a fraudulent* grantor, his heirs, his assigns or his privies, to reclaim or recover from his transferee property transferred in fraud of its creditors, or its proceeds.

Dent v. *Ferguson,* 132 U. S. 50.
Randall v. *Howard,* 67 U. S. 585.
Wheeler v. *Tage,* 68 U. S. 1 Wall. 518.

This, then, being a suit in which the Receiver represents the creditors alone, and one which it would be against public policy for him to prosecute for the benefit of the Bank or its shareholders, the question for determination is,

Can a Receiver recover against a Director of a National Bank, for negligence, unless the negligence charged is an omission or violation of a duty which the Director owed to the party for whose benefit the action is brought?

It is an elementary rule of the law of negligence, that in a cause of action founded on negligence, there are neces-

sarily three elements necessary to the existence of the cause of action, and unless the three elements exist, no cause of action is charged. These elements are (1) The existence of a duty on the part of defendant *to protect plaintiff* from injury; (2) Failure of defendant to perform that duty; and (3) Injury to the plaintiff from such failure of defendant. This rule is so elementary that we content ourselves with citing only

43 C. J. 632, and cases there cited.

Applying this rule to this case, if we be correct in our conclusion that in this suit the Receiver represents only the creditors, and that creditors will be the only ones who will benefit by a recovery, then no cause of action was stated in the complaint, nor proved by the evidence, against Ekstrom, for Ekstrom, neither as Director of the Bank nor as President of the Joint Company, owed any duty to the creditors. If, as Director of the Bank, he owed any duty to keep confidential information that he received at a Directors' meeting, he owed that duty to the Bank, not the creditors, and, consequently, the creditors, nor the Receiver for them, could complain, even though they were damaged, unless the negligence which caused their damage, was the violation of a duty which defendant owed to them. Even though an act or omission may involve a lack of care and thus constitute negligence in the colloquial meaning of the term, it does not follow that a cause of action arises therefrom. To constitute *actionable* negligence there must be not only a lack of care, but such lack of care must involve a breach of some duty *owed to the person* who is injured in consequence of such breach (43 C. J. 631 and cases there cited).

If the Directors of the Bank were trustees for the creditors to the extent that they, as such Officers, held the assets of the Bank in trust for ratable distribution to the creditors in case of the Bank's insolvency, then if Ekstrom as one of

the Directors, neglected to perform that duty or violated the duty, and the creditors were thereby injured, they of course could complain. But the Directors are not such trustees and owed to the creditors no such duty, consequently Ekstrom, one of the Directors, owed no duty to the creditors for whose use the Receiver brought the action, and no actionable negligence was charged or proven against him.

Assuming he violated a duty he owed to the Bank when he took advantage of knowledge which he acquired at a Directors' meeting to assist the Joint Company to a preference, upon what theory could the creditors complain? If the action attempted to be stated against Ekstrom is negligence—and Respondent has always claimed that it was, and the Court of Appeals finds that it was such an action—then Respondent has failed to aver or prove a necessary element of his action, namely, that Ekstrom owed any duty to the creditors, or that they were damaged by reason of the breach of a duty owing from Ekstrom to them.

This rule has not only been stated by innumerable State Courts, but has been repeatedly recognized and approved by this Court.

In the case of *Chesapeake & O. R. Co.* v. *Mihas,* 280 U. S. 102—(106), speaking through Mr. Justice Sutherland, this Court said:

> "And the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation *unless that duty or obligation was one owing to complainant.*"

The following cases by this Court announce the same rule:

Chesapeake & O. R. Co. v. *Nixon,* 271 U. S. 218.
Northern Pacific R. Co. v. *Adams,* 192 U. S. 440 (450).
National Sav. Bank v. *Ward,* 10 Otto 195.

In Conclusion.

We have presented our views in this case perhaps more fully than the nature of the case justifies, but the law governing preferences to depositors by National Banks, and the construction and application of R. S. 5242, in cases where the Bank has paid a depositor shortly before suspension, is so uncertain that we feel justified in the prolixity of our argument. The pecuniary effect upon petitioners in this case, if the decree is sustained, is insignificant, but the principle involved is big, and the necessity of settling the law is plain and urgent. Whether petitioners are wronged by the decree, or are not, counsel will feel amply rewarded if the law on the subject is clarified and stated by this Court of last resort. It is apparent from the reports of the Federal Courts, that the law on the subject is not well settled. The decisions of the Courts of Appeal in the several circuits are not in harmony and the result is, not only that needless expense is incurred in litigating apparent fraudulent preferences made in the closing days of National Banks; unnecessary and damaging charges of fraud are made by appointees of the Comptroller, which, coming from that source, tend to arouse hatred and hard feelings, but counsel are unable to advise their clients with certainty or accuracy. We respectfully urge that this Court clarify the law and re-state the law in the interest of the public, and reverse the decree of the Court below.

Respectfully submitted,

Samuel R. Kenworthy,
Solicitor for Mechanics Universal Joint Company.

Shelby L. Large,
Solicitor for Grace M. Ekstrom, Administratrix of the Estate of Eric Ekstrom, Deceased.